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In The

Supreme Court of the United States

October Term, 1996

MARK MOREHEAD,

Petitioner,

vs.

ATKINSON-KIEWIT, J.V. AND WOODS HOLE TOWING COMPANY, INC.,

Respondents.

ROCCO P. DIGIOVANNI, JR.,

Petitioner,

vs.

TRAYLOR BROTHERS, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where one entity acts in a dual capacity (as maritime construction company and vessel operator) and uses the same group of employees to perform maritime construction duties and vessel operation duties, under what circumstances will it be held liable for its negligence under 33 U.S.C. § 905(b)?

2. What is the definition of "vessel in navigation" for purposes of the Jones Act, 46 U.S.C. § 688?

LIST OF PARTIES

Rocco DiGiovanni, Jr.
Plaintiff-Petitioner

Mark Morehead
Plaintiff-Petitioner

Traylor Brothers, Inc.
Defendant-Respondent

Atkinson-Kiewit, J.V.
Defendant-Respondent

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The second *en banc* decision of the United States Court of Appeals for the First Circuit in the case of *DiGiovanni v. Traylor Bros., Inc.*, is reported at 1996 WL 570563.

The *en banc* decision of the United States Court of Appeals for the First Circuit in the case of *Morehead v. Atkinson-Kiewit, J.V., et. al.*, is reported at 1996 WL 570537.

The panel decisions and *en banc* decisions for all three cases have been reproduced in the appendix.

STATEMENT OF JURISDICTION

This petition seeks review of the judgments of the United States Court of Appeals for the First Circuit entered on March 4, 1992 and on October 10, 1996. This petition is filed timely pursuant to 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

1. The Jones Act, 46 U.S.C. § 688(a):

> (a) Application of railway employee statutes; jurisdiction.
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at

law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

2. 33 U.S.C. §905(b):

(b) Negligence of vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of sections 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be

> permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

A. Morehead v. Atkinson-Kiewit

On January 29, 1990 Mark Morehead was untying a barge from another barge when he stepped backwards into an open hatch that was flush with the barge's deck. He was seriously injured. The barge had been taken out of construction service before the accident. It had been "set off to the side" of the pier outside of Atkinson-Kiewit's Davisville headquarters. The barge was not carrying materials, supplies, or construction materials of any kind at the time of the accident. The barge needed to be aired out because it was being returned to its owner, or going "off hire".

The hatch in which Morehead fell had been opened by Steven Breault. Breault, an Atkinson-Kiewit employee, was a dock builder with navigation duties aboard the barge. Breault opened the hatch to "air out" the barge. The *only* evidence proffered at trial was that the hatch had been open for at least two days before the accident, per order of Ray Norman, Atkinson-Kiewit's foreman. Atkinson-Kiewit had a contract with the State of Rhode Island to build the Jamestown Bridge, spanning Narragansett Bay. Atkinson-Kiewit hired carpenters and laborers to perform the bridge construction. This work involved cutting timbers and steel, pouring concrete, welding, and other construction duties. To do the work and transport materials around the bay, Atkinson-Kiewit chartered barges. It did *not* employ separate workers to navigate the barges, however. Instead, the carpenters and laborers who did the bridge construction work also maintained and operated the barges. They would handle the lines on the barges, tie the barges to the tug, and participate in the manning and moving of the barges. In fact, Morehead worked as both a construction worker and a scowman aboard the various barges.

The trial court ruled that Atkinson-Kiewit was negligent as an employer rather than as a vessel owner, and denied Morehead's claim pursuant to 33 U.S.C. § 905(b). On the very same day that a panel of the First Circuit allowed recovery in *DiGiovanni,* it denied recovery in *Morehead,* interpreting the same statute in a strikingly different manner. The First Circuit Court of Appeals, sitting *en banc,* affirmed.

B. DiGiovanni v. Traylor Bros. Inc.

On September 30, 1988 Rocco P. DiGiovanni was a member of the crew of a crane-carrying barge which transported a crane and supplies around Narragansett Bay in Rhode Island and participated in the building of piers and coffer dams for the

Jamestown Bridge project. He was injured when he slipped on hydraulic fluid that had leaked on deck and which had been leaking for at least one month. DiGiovanni sought damages under the Jones Act, 46 U.S.C. § 688, and the general maritime law, and invoked the maritime jurisdiction of the United States District Court for the District of Rhode Island. After a three day trial, the jury returned a verdict in favor of the plaintiff on the Jones Act and general maritime law counts. In that trial, the jury never reached the alternative count alleging that DiGiovanni was a maritime employee entitled to recover for the negligence of a vessel pursuant to 33 U.S.C. § 905(b), because the court instructed the jury that if they found the plaintiff to be a seaman they could not reach the § 905(b) count.

The defendant appealed to the First Circuit Court of Appeals, which enunciated a new legal rule defining what constitutes a "vessel in navigation" under the Jones Act. The court ruled as a matter of law that the DiGiovanni craft was not a vessel in navigation, and reversed and remanded, limiting the issue to consideration only of the negligence question under 33 U.S.C. § 905(b).

On remand, the trial judge entered judgment in favor of the defendant, ruling that although the defendant was negligent, its negligence was not committed by it in its capacity as vessel owner. A panel of the First Circuit vacated and remanded the decision, reasoning that "admiralty loathes the notion of a vessel under way with no crew". The First Circuit Court of Appeals, sitting *en banc,* vacated the panel's decision and affirmed the trial court's decision.

1. Physical Description of the Barges

The BETTY F is a 40' x 100' steel hull barge. It has a raked bow, which is at an angle from the front to the back. It has

navigation lights for transportation. The vessel had to be maintained to Coast Guard standards. The Coast Guard boarded the BETTY F frequently to inspect it. The vessel was registered with the Coast Guard; when it was purchased, Traylor Brothers had to inscribe its name and its Wilmington, Delaware registration on the vessel for navigational reasons. The Coast Guard also required that the barge's anchor balls had to be painted white with quick flashing white lights on it for navigational reasons. A warning whistle had to be kept on board to warn other vessels. A fender system had to be placed on the side of the barge so that it wouldn't be damaged by nor cause damage to other vessels coming close to it. While aboard her, the men had to wear life jackets.

The BETTY F was equipped with load lines, which the Coast Guard required be kept in a visible condition. The load lines were used to ballast the vessel down and keep it flat or trim. The barge also had internal compartments or bulkheads which would be filled with water to ballast the vessel. The BETTY F would travel to Davisville, Rhode Island and hook up to hydrants located there to fill it with water. Various compartments would be filled with water consistent with wind and tide conditions and to counterbalance whatever was on the other side of the barge, *i.e.*, if the barge's crane were lifting a heavy weight, etc.

The BETTY F had toilet facilities and an enclosed area where the crew could eat, which contained a small cafeteria with a stove and refrigerator. A tool shack and a sitting area were located near the bow of the vessel.

2. Movement of the Barges

The BETTY F carried a crane which it would transport around Narragansett Bay to construct piers and coffer dams for

the Jamestown Bridge. The job could not be performed by a land based crane. The barge had to be moved to put the crane wherever it was needed. Approximately once each month the BETTY F was moved across navigable waters, aided by a tug or push boat, in order to transport the crane to a new job site. This special-purpose vessel had been outfitted in Davisville, Rhode Island one month before the accident, and presumably brought by tug to the job site where the injury occurred. The undisputed testimony of the petitioner is that he "travelled quite a bit on the BETTY F". The supply barge that was part and parcel of the BETTY F had transported cargo on the day of the accident. In fact, it would be brought to and from Davisville at various operations of the job whenever supplies were needed or anything else was needed at the job site. The supply barge carried a hammer that was part of the BETTY F's crane. It also carried a power pack, H beams, and sheetings.

The BETTY F was moved around the job site on a daily basis. Every day it was moved around the work area, and at night, it was moved away from the work area so that it wouldn't sustain any damage from the motion of the water or the wind.

3. The Petitioner's Job Duties

DiGiovanni was taken to the BETTY F each morning by crew boat. When the BETTY F was taken to a new job site, DiGiovanni would respond to the tug captain's orders as well as the barge captain's orders regarding the handling of the lines connecting the tug and barge. He would continue to slack and secure these lines during the voyage. He would ride the vessel to the new site, keeping watch in front of the barge so it wouldn't hit anything. DiGiovanni would check the vessel for seaworthiness, and clear its decks. He would also take part in the ballasting of the vessel. Another one of the DiGiovanni's job duties was to act as a tag man during pile-driving operations.

Instead of hiring separate crews to man its vessels, Traylor Brothers used its construction workers to perform both construction-related tasks and vessel-related tasks. Taylor's general superintendent on the project, Edward Brush, supervised the workers and had the responsibility to make sure that all of the equipment on the job, including the barges, were safe.

REASONS FOR GRANTING THE WRIT

I.

THE FIRST CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

Pursuant to Supreme Court Rule 10(c), this Court may grant review on a writ of certiorari where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court. . . ." Supreme Court Rule 10(c). The important federal question is as follows: how does one distinguish between vessel negligence and employer negligence where the same entity is both vessel owner and employer, and the same employees have vessel-related duties and employer-related duties? The distinction is important, because pursuant to 33 U.S.C. § 905(b), a maritime worker has a cause of action when he is injured by the negligence of a "vessel". "Maritime worker" is defined in 33 U.S.C. § 902(3) and includes longshoremen, harbor workers, and a host of other employees. "Vessel" is defined in 33 U.S.C. § 902(21) to include the vessel's "master, officer, or crew member". Congress itself recognized the importance of uniformity in interpreting this maritime negligence action. In the Committee Notes, it states: "the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different

ports depending on the law of the state in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal Law". 1972 U.S.C.C.A.N. 4705.

This Court has touched upon the "dual capacity" issue, but ever so lightly. In *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 530-32 (1983), the shipowner asserted that it could not be held liable for negligence damages because it was an employer and its liability was limited to the payment of compensation. The *Pfeifer* Court disagreed. It held that an owner of a vessel which acts as its own stevedore may be held liable for *both* compensation and negligence damages when a stevedore who is directly employed by it is injured as a result of the vessel owner's negligence. The Court made it clear that in order to be liable, the vessel owner had to have been acting in its vessel owner capacity, not in its stevedore capacity. 462 U.S. at 531, n.6.

In its fifty-eight page *en banc* decision, the First Circuit Court of Appeals (Campbell, J.) states that this is an issue of first impression: "But the Supreme Court has not yet had occasion to analyze the vessel's duties in a dual capacity case. Nor has the Court considered to what degree its *Scindia* analysis applies to non-longshoring harborworkers, whose duties and modus operandi differ considerably from those of longshore workers". *Morehead, en banc* decision at 15a, 16a.

Two judges of the First Circuit have specifically requested the Supreme Court to resolve this issue:

> I write separately, however to urge the Supreme Court and Congress to reflect upon the mind games that *Jones and Laughlin* —

> particularly as applied to harbor workers-compels us to play. . . .

Morehead, en banc decision at 31a (Selya, J. concurring).

In his dissenting opinion, Judge Cyr writes:

> Neither the Congress nor the *Scindia* Court could have foreseen the recent, fast-paced evolution in maritime construction practices which has exacerbated the instant controversy. Ultimately, therefore, the Congress or the Supreme Court must provide a definitive response to the present conundrum.

Morehead, en banc decision at 46a (Cyr, J.) (dissenting).

II.

THE DECISIONS CONFLICT WITH THE STATUTORY LANGUAGE OF 33 U.S.C. § 905(b).

A maritime worker may recover in tort if he is injured by the negligence of a vessel. 33 U.S.C. § 905(b). The statute defines the term vessel to include its "master, officer or crew member". 33 U.S.C. § 902(21). A vessel is therefore also liable for the negligence of its employees. This makes sense. This Court stated in *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963) that "there is no distinction in admiralty between torts committed by the ship itself and by the ship's personnel while operating it, any more than there is between torts committed by a corporation and by its employees". The injuries in both *Morehead* and *DiGiovanni* were caused by the negligence

of a vessel. In *Morehead,* an employee of the vessel left its hatch open, uncovered, and unguarded for three days, without any warning or notice. In *DiGiovanni,* the vessel's hydraulic power pack had been leaking for at least one month, its deck was not equipped with a non-skid surface, and its crane was "herky-jerky". Yet, the First Circuit effectively repealed 33 U.S.C. § 905(b) by denying recovery in each case.

A. History of the Longshore and Harbor Workers' Compensation Act (LHWCA)

The LHWCA was enacted in 1927. 44 Stat. 1424 (1927). It was a remedial act, designed to protect maritime workers. This Court has stated that the LHWCA "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results". *Reed v. Yaka,* 373 U.S. 410, 415 (1963); *Jackson v. Lykes Steamship Co.,* 386 U.S. 731 (1967) ("an Act designed to provide equal justice to every longshoreman similarly situated").

Congress reexamined and amended the LHWCA in 1972. 33 U.S.C. § 901, *et seq.* It observed that "longshoring remains one of the most hazardous types of occupations". 1972 U.S.C.C.A.N. 4705. Congress hoped that the passage of the amendments would bring "further progress in reducing injuries". *Ibid.* Congress enhanced the remedial nature of the LHWCA in five major respects: (a) it allowed more people to be covered under the Act by expanding the definition of the term "maritime employee"; (b) it eliminated the requirement that an injury occur on navigable waters to be compensable, 33 U.S.C. § 903(a); (c) it increased the benefits payable to injured workers; (d) it established for the first time a statutory right for an employee covered under the LHWCA to sue shipowners as third parties based upon negligence, which it condified at 33 U.S.C.

§ 905(b)[1]. *See generally* 1A Jhirad, *Benedict on Admiralty* § 93, at 5-12 (7th ed. 1992); and (e) it eliminated indemnity actions by the shipowner against the stevedore, repealing the *Ryan* doctrine. *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

Congress' stated reason for the new statutory cause of action (§ 905(b)) was the common refrain throughout the LHWCA: safety. The House Report states:

> Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

1972 U.S.C.C.A.N. 4704. As an example, the committee posits a situation where a longshoremen slips on an oil spill on the deck of a vessel:

> So, for example, where a longshoremen slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: (1) the vessel put the foreign substance on the deck, or knew that it was

1. The Act also eliminated a longshoreman's right to recover for the unseaworthiness of a vessel as previously allowed in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

> there, and willfully or negligently failed to remove it; or (2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances.

Ibid.

The First Circuit has taken away a remedy which Congress has given, which it cannot do. In the case of *Miles v. Apex Marine,* this Court noted that the Admiralty Courts could not provide a remedy that was not given by Congress. 498 U.S. 19 (1990). By the same token, then, the Admiralty Court cannot take away a remedy firmly established by Congress to promote and encourage maritime safety.

B. The First Circuit's Decisions Violate Congress' Mandate that Similarly Situated Workers Should Have the Same Rights, Regardless of the Employment Arrangement.

A vessel owner should not be penalized when it employs its own maritime workers. By the same token, a maritime worker should not be denied a remedy where the vessel owner fails to hire a specialized, separate crew to take care of the vessel. That is exactly what happened here.

> The Committee believes that the rights of an injured longshoreman should not depend on whether he was employed directly by the vessel or by an independent contractor . . . The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own

> longshoremen or shipbuilders or repairmen as apply when an independent contractor employs such persons.

1972 U.S.C.C.A.N. 4705.

In both cases, the evidence qualified the plaintiffs for recovery because they were injured by the negligence of the vessel's employees. 33 U.S.C. § 902(21); this renders the vessel liable for negligence under § 905(b). But by calling its vessel employees "construction workers", the defendants immunized themselves from virtually any potential negligence action under § 905(b). Allowing this case to stand would implicitly repeal the statute and promote form over substance. This Court has on three occasions struck down artificial employer-employee relationships where a shipowner has acted as its own contractor and hired all of its workers directly, and then claimed immunity under the compensation statute. *Reed v. Yaka,* 373 U.S. 410 (1963); *Jackson v. Lykes Steamship Co.,* 386 U.S. 731 (1967); *Jones and Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523 (1983). The First Circuit decisions are in direct conflict with these cases.

III.

THE DECISIONS CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

As discussed earlier, the Court in its *Pfeifer* decision stated that a vessel owner acting as its own stevedore is liable only for negligence in its vessel owner capacity, not for negligence in its stevedore capacity. 462 U.S. at 531, n. 6. Unlike in the present cases, however, *Pfeifer* did not involve a case where the employees acted in a dual capacity. A logical extension of the *Pfeifer* principle would be that where vessel employees also act as stevedores (or in this case, as maritime workers), they render

the vessel liable only when acting in their vessel employee capacity. Under a *Pfeifer* analysis, then, the court should look at the negligence which caused the injury. There are two possible scenarios which can arise:

> 1. There is a defect with the vessel or its appliances, appurtenances or equipment that the vessel owner or its agents, servants or employees either knew, or should have known, about.[2]
>
> 2. An employee of the vessel is negligent while doing something in connection with the vessel.

Under the first scenario, it is irrelevant who actually caused the defect if the vessel owners or their agents, servants or employees either knew or should have known about it. *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92 (1994) (sufficient evidence in the record to support a permissible inference that, during the loading process, some crew members, who might have held positions such that their knowledge should be attributed to the vessel, did in fact observe the plastic on the 'tween deck). Under the second scenario, the court must look to see if the negligent act was an act of "vessel negligence" under § 905(b), which includes negligent acts of the vessel's master, agent, officer, operator or crew member. If the tortfeasor has vessel-related duties and non-vessel related duties, the court must look at what the tortfeasor was doing which caused the injury. For example, if a harbor worker negligently throws a vessel's bow line to another harbor worker and hits him in the eye, it is an act of vessel negligence and recovery would lie. On the other hand, if the harbor worker negligently throws a coil of rope to another harbor worker while the two are on land, it is not an act of vessel

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2. This is not tantamount to an action for "unseaworthiness", where negligence need not be shown.

negligence and recovery would be limited to compensation benefits.

To state it another way, under *Pfeifer* a dual capacity vessel owner is liable only for negligence committed by it in its vessel owner capacity. Following that principle to its logical conclusion, a dual capacity employee will render the vessel liable only if he is acting for the vessel at the time the negligent act is committed. This can be the only interpretation of *Pfeifer,* especially in light of the underlying theme of the 1972 LHWCA amendments: to promote safety, and to make vessels liable for their own acts of negligence.

The First Circuit refused to conduct a *Pfeifer* analysis. The First Circuit stated that "While an emphasis on vessel type duties may be appropriate for the fact specific inquiry into seaman status, we place little weight on this attempt to bifurcate vessel and construction activities when these workers were hired to perform both". *Morehead en banc* opinion at 18, n. 13. The First Circuit's concern is that by analyzing a worker's duties at the time of the accident, the worker could drift in and out of coverage. In support of its position, it cites two sources: this Court's decision in *Chandris v. Latsis,* 115 S. Ct. 2172 (1995) (which was a *Jones Act,* not a § 905(b) decision); and, language from the legislative history of the LHWCA stating that the Act was promulgated to ensure certainty of coverage. Both sources are inapposite, and cannot be taken out of context. Maritime compensation coverage (33 U.S.C. § 904), the Jones Act (46 U.S.C. § 688), and vessel negligence (33 U.S.C. § 905(b)) are as different from each other as apples, oranges, and pears. Uniformity of coverage is key under the federal compensation system for maritime workers. The 1972 amendments were designed to end the situation where a maritime worker would collect state compensation if injured on land, and federal compensation if injured on navigable waters. Under the Jones

Act, 46 U.S.C. § 688, one of the elements of proof is that the plaintiff be a "member of a crew" of a vessel. This necessarily involves an inquiry into the plaintiff's overall duties, as this Court did in *Chandris v. Latsis,* 115 S. Ct. 2172 (1995), to determine whether the plaintiff has a "substantial employment- related connection to a vessel in navigation". 115 S. Ct. at 2192. Unlike in maritime compensation and Jones Act cases, however, *vessel negligence* is the *only inquiry* in a § 905(b) case. Once an individual qualifies as a maritime employee under 33 U.S.C. § 902(3), it is irrelevant how frequently he is aboard a vessel, or that he may sue a vessel under § 905(b) if he falls into an open hatch on a vessel but not in an open manhole on land.

Maritime workers are provided with certainty of coverage for their compensation benefits pursuant to § 904 of the LHWCA. The Act covers them whether they are injured ashore or on navigable waters, or whether they are injured on or off of a vessel. However, the same cannot be said for actions under § 905(b). Because Congress has afforded workers an additional statutory remedy for injuries caused by the negligence of a vessel, the only "certainty of coverage" that can exist is that harbor workers injured by the negligence of a vessel or by those doing vessel related duties can recover § 905 (b) damages. Those who are not injured by the negligence of a vessel are limited to compensation benefits under § 904.

DiGiovanni and *Morehead* are also inconsistent with this Court's reasoning in *Scindia v. De Los Santos,* 451 U.S. 156 (1981). In *Scindia,* a longshoreman was injured while working in the ship's hold when he was struck by sacks of wheat which fell from a pallet. It was unclear whether the sacks had fallen due to the longshoremen's negligent operation of the winch, or due to the winch's defective braking mechanism. It was also unclear whether the shipowner was aware or chargeable with knowledge of the problem with the winch. Among other things,

the Court held that the shipowner did not have a continuing duty to supervise and inspect the stevedore's cargo-handling operation as "such an approach would repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship". *Id.* at 169. The theory behind the "turnover" doctrine is simple. A vessel is liable pursuant to 33 U.S.C. § 905(b) for its own negligence, not for the negligence of the subcontractors it hires such as stevedores and ship repairers.

In *DiGiovanni* and *Morehead* the First Circuit allowed the vessel owners to exonerate themselves from their own acts of negligence simply because they manned their vessel with union construction workers and characterized their actions as construction activities rather than vessel activities. This violates the mandate of *Scindia* that vessel owners be responsible for their own acts of negligence.

IV.

THE DECISIONS CREATE A SPLIT BETWEEN THE CIRCUITS.

Unlike the First Circuit, the Fifth Circuit has stated that a vessel owner cannot be said to have turned a vessel over to itself where it is contractually obligated to perform a job, requires the vessel to effectuate the obligation, and remains in control of the vessel to do so. *Masinter v. Tenneco Oil Co.*, 867 F.2d 892 (5th Cir. 1989). *Morehead* and *DiGiovanni* are factually similar. Traylor Bros. and A-K remained in control of the barges, moving them around the bay in furtherance of their overall mission: the construction of the Jamestown Bridge, which they were contractually obligated to build. Although some cases stand for the proposition that a vessel owner can turn a vessel over to its own employees, the *types* of work that the employees

performed in those cases was of a separate, specialized nature. *Pfeifer, supra* (shipowner/stevedore); *Scindia, supra* (shipowner/stevedore); *Castorina v. Lykes Bros.*, 758 F.2d 1025 (5th Cir. 1985) (shipowner/stevedore); *Elberg v. Mobil Oil Corp.*, 967 F.2d 1146 (7th Cir. 1992) (shipowner/welder). Not *one case* has ever held that a turnover existed in facts similar to the *Morehead* and *DiGiovanni* cases.

Following this reasoning, the Fifth Circuit also reached a different result in a case very similar to *DiGiovanni* and *Morehead.* In *Pichof v. Bisso Towboat Co., Inc.*, 748 F.2d 300 (5th Cir. 1984) the vessel owner acted as its own repairer. The vessel's employee, a repairman, was injured when he slipped on diesel fuel on the bilge floor. The vessel owner alleged that it was negligent as a vessel repairer, not as an owner. 748 F.2d at 302. The Fifth Circuit observed that "the line between owner and repairer is dull and elusive, at best". *Id.* at 303. Relying on "intuition and common sense" the court held that the negligence was at least partly vessel negligence and thus recovery could be had under §905(b). *Ibid. See also Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789 (2d Cir. 1979) (vessel owner's president who participated in repair mission and was negligent was not immune from suit, as "supervisory personnel in particular will continue to fulfill their general duties as agents of the shipowner"). In *Fanetti v. Hellenic Lines, Ltd.*, 678 F.2d 424 (2d Cir. 1982) a shipowner acted as its own stevedore and tried to claim immunity from suit for its crewmember's negligence. In allowing recovery, the *Fanetti* court observed that "a jury charge which relieved a shipowner of liability for a dangerous condition which was known to the stevedore or to any of its employees is clearly inappropriate where the shipowner, itself, is the stevedore". 678 F.2d 428.

The court reasoned that although a shipowner has a right to rely on an independent expert contractor, it cannot rely upon an

expert contractor who, in fact, was not there. *Id.* at 430. The Court characterized such a concept as "schizophrenic" and "the predictable effect upon the jury one of bafflement". *Ibid.*

V.

THE FIRST CIRCUIT'S DEFINITION OF THE TERM "VESSEL IN NAVIGATION" TO ALLOW RECOVERY FOR JONES ACT NEGLIGENCE CONFLICTS WITH DEFINITIONS ESTABLISHED BY OTHER CIRCUITS AND BY THIS COURT.

This petition for certiorari is the second petition which DiGiovanni has filed. Originally, the jury returned a verdict in favor of DiGiovanni on the Jones Act (46 U.S.C. § 688) and on the general maritime law counts. In light of the fact that the jury found DiGiovanni to be a Jones Act seaman, it never reached the issue of whether he was a "maritime employee" pursuant to 33 U.S.C. § 902. The First Circuit Court of Appeals, sitting *en banc,* changed the definition of the term "vessel" under the Jones Act. 959 F.2d 119 (1st Cir. 1992) (*en banc*). The court reversed and remanded the case for consideration of the 33 U.S.C. § 905(b) issue, which was never reached. DiGiovanni petitioned for certiorari to this Court, which denied the petition on October 5, 1992. 506 U.S. 827 (1992).

At the second trial of DiGiovanni, the trial court found that "for at least a week before the accident, hydraulic fluid had been leaking from the power pack onto the metal deck of the supply barge. . . .Consequently, the deck of the supply barge remained very slippery for the week or so leading up to the accident". The court held, however, that the defendant was not negligent in its capacity as vessel owner. The effect of the two decisions has been to leave DiGiovanni without a negligence cause of action. DiGiovanni must be either "fish or fowl". For

this reason, and for the reason that the circuits have conflicting definitions of the term "vessel in navigation" which have not been reconciled despite 75 years of maritime jurisprudence, DiGiovanni once again asks this Court to grant certiorari on this issue.

This case should also be heard by this Court due to the large number of barges in this country, the ever increasing amount of barge traffic and concomitant accidents, and the great volume of maritime tort cases pending nationwide. Between 1978 and 1988, the number of registered vessels rose 33 1/3%. *National Transportation Statistics Annual Report* (July 1990). Of the 40,000 registered vessels, 31,125 were presumably barges (non-self-propelled vessels). *Id.* at 32. Moreover, 6,367 vessels were involved in marine accidents in 1988, a 15% increase over the previous year. *Id.* at 80. During that same period of time, the number of millions of tons of goods moved by barge increased from 3.8 tons to 4.6 tons, an increase of 21%. *See Waterborne Commerce of the United States* (Army Corps of Engineers 1989). Over the past five years, approximately 3,000 maritime personal injury suits have been commenced annually; at any given time, there are roughly 4,000 maritime personal injury suits pending. *See Annual Report of the Director of the Administrative Office of the United States Court* (1987-1991).

A. The Conflict Between the Circuits on the Definition of "Vessel in Navigation" under the Jones Act.

The *en banc* First Circuit decision held that as a matter of law, the BETTY F was not a vessel for seaman status purposes at the time of DiGiovanni's injury. The Court announced a new legal rule: "if a barge or other float's 'purpose or primary business is *not* navigation or commerce', then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit". 959 F.2d 1119, 1123.

In a 1996 case, the Second Circuit Court of Appeals criticized the *DiGiovanni* approach and refused to adopt the "primary purpose" test. *Tonneson v. Yonkers Contracting Co., Inc.*, 82 F.3d 30 (2nd Cir. 1996). The *Tonneson* court noted that although the First Circuit thought it had adopted the Fifth Circuit's test, "it applied the Fifth Circuit's test far more restrictively than the Fifth Circuit, or, for that matter, any circuit, ever had". 82 F.3d at 34. In enunciating a different test, the Second Circuit observed that it would not follow the First Circuit's "restrictive interpretation of 'vessel in navigation' ". *Ibid.* The Second Circuit's test is:

> (1) Whether the structure was being used primarily as a work platform during a reasonable period of time immediately preceding the accident; (2) whether the structure was moored or otherwise secured at the time of the accident; and (3) whether, despite being capable of movement, any transportation function performed by the structure was merely incidental to its primary purpose of serving as a work platform.

82 F.3d at 36.

The Ninth Circuit Court of Appeals has a different definition of the term "vessel in navigation" than either the First Circuit or the Second Circuit. In the most recent case of *Gizoni v. Southwest Marine, Inc.*, the Ninth Circuit held that jury instructions (pursuant to which the jury found that Gizoni was not a seaman) emphasizing that a structure was not a vessel if its transportation functions were only incidental, were wrong:

> The fact that the craft was constructed for a purpose other than the transportation of

> persons or things from one place to another does not mean that as a matter of law, it is not a vessel in navigation. The vessel instruction here ignores *Wenzel* by overstating the importance of the transportation purpose . . . We have indicated before that unusual looking crafts whose purpose is not the transportation of persons or things can be considered vessels under the Jones Act.

Gizoni v. Southwest Marine, Inc., 909 F.2d 385 (9th Cir. 1990), *aff'd*, 502 U.S. 81, 56 F.3d 1138, 1142 (9th Cir. 1995) (citations omitted).

B. The Conflict Between the Supreme Court and the First Circuit on the Definition of "Vessel in Navigation" under the Jones Act.

While this Court has never directly addressed the issue of what constitutes a "vessel in navigation", it has found non-conventional watercraft of limited mobility to be considered vessels for Jones Act purposes. *Gianfala v. The Texas Co.*, 350 U.S. 879 (1955) (drilling barge without motive power or navigation lights which had its spuds in place at the time of the accident); *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957) (a dredge which was anchored to shore at all times during the plaintiff's employment and was seldom moved); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991) (a pontoon barge without motive power secured to the end of a floating dry dock); *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) (pile driver injured on submersible radar installation).

The *DiGiovanni* case also conflicts with this Court's rationale behind *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991) (worker need not perform transportation related

functions on board a vessel to be a seaman). In *Wilander,* this Court recognized the concept of special purpose vessels:

> In the early periods of maritime commerce, when the oar was the great agent of propulsion, vessels were entirely unlike those of modern times and each nation and period has had its peculiar agents of commerce and navigation adopted to its own wants and its own waters; and the *names* and *descriptions* of *ships* and vessels are *without number* . . . there are other functions besides these of mere navigation, and they are performed by men who know nothing of seamanship. . . .

498 U.S. at 345 (emphasis added). It is inconsistent for the First Circuit to fail to recognize special purposes vessels where this Court has recognized special purpose seamen. In the case of *Chandris, Inc. v. Latsis,* __ U.S __, 115 S. Ct. 2172 (1995) this Court allowed the jury to consider the time that an engineer spent aboard a vessel in dry dock to be considered in determining whether he had the requisite employment related connection to a "vessel in navigation".

In *Wilander, supra* this Court decided the issue of "who is a seaman". In *Latsis, supra* this Court decided the issue of the requisite duration of a worker's connection to a vessel in order to be eligible for a seaman status; a definition of the phrase "vessel in navigation" would remove the conflict among the circuits and restore uniformity in maritime commerce.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED OCTOBER 10, 1996 IN *MOREHEAD V. ATKINSON-KIEWIT, J/V, ET AL.*

United States Court of Appeals
For the First Circuit

No. 94-1581

MARK MOREHEAD,

Plaintiff, Appellant,

v.

ATKINSON-KIEWIT, J/V, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Bailey Aldrich,* *Senior Circuit Judge*]

Before

Torruella, *Chief Judge*,
Campbell, *Senior Circuit Judge*,
Selya, Cyr, Boudin, Stahl and Lynch, *Circuit Judges*.

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* Of the First Circuit, sitting by designation.

Appendix A

Thomas M. Bond, David B. Kaplan and *The Kaplan/Bond Group* on brief for appellant.

Thomas E. Clinton, Robert E. Collins and *Clinton & Muzyka, P.C.* on brief for appellees.

Myles W. McDonough and *Sloane and Walsh* on brief for J.M Cashman, Inc. and Cashman, KPA, A Joint Venture, *amicus curiae.*

October 10, 1996

OPINION EN BANC

CAMPBELL, *Senior Circuit Judge.* This appeal comes before the en banc court following our vacating of an unpublished panel decision in this case issued on February 6, 1996, affirming the decision of the district court. On the day of the panel opinion, another panel of this court handed down a decision construing the federal statute underlying both appeals in a materially different way. *Rocco P. DiGiovanni, Jr. v. Traylor Bros. Inc.*, No. 94-1775. We vacated both opinions and granted rehearing en banc so as to provide a consistent rule in this circuit pending, at least, further instruction from the Supreme Court or Congress.

Plaintiff Mark Morehead, a harbor worker injured while working on a construction barge, appeals from a judgment of the district court dismissing his negligence action against Atkinson-Kiewit, J/V ("A-K"), a firm that was both his employer and the charterer of the barge. Morehead brought this action under section 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, authorizing covered employees to sue the vessel as a third party for injury caused by the negligence of the vessel. In its capacity as Morehead's employer, A-K is immune from tort actions

brought by covered employees like Morehead. But as the bare boat charterer of the barge on which Morehead was injured, A-K is deemed also to be the statutory vessel owner; and it was in this capacity that A-K was sued.

The case raises difficult questions of first impression in this circuit as to the liability of a so-called dual capacity employer under the LHWCA. We must decide whether A-K's alleged negligence occurred in its "employer" capacity (a capacity immune from suit), or rather was in its capacity as "vessel" (a negligence action being authorized under section 905(b) against a vessel as third-party). While the Supreme Court has endorsed the bringing of section 905(b) negligence actions against a dual capacity defendant in its vessel owner capacity, the Court has yet to define, in such a case, the point at which employer responsibility ends and vessel responsibility begins. Nor has the Court decided to what extent principles laid down in negligence actions brought by longshore workers against a vessel owned by a third-party apply to claims by non-stevedoring contractor harbor workers brought against a vessel owned by their own employer.

I. Background

Mark Morehead was employed by A-K, a joint venture formed between Guy Atkinson Co. and Kiewit Eastern to complete the construction of the Jamestown Bridge spanning Narragansett Bay in Rhode Island. In order to transport materials and equipment around the bay to the work sites, A-K bare boat chartered several barges. The barges involved in this case, the CHER 106 and the HUGHES 707, were flat deck barges — floating platforms bare of structures or equipment. A-K also leased two tugs from Woods Hole Towing Co. to transport the

barges where needed. The tugs themselves were crewed by Woods Hole employees.[1]

A-K hired carpenters from a local union to build the bridge. Their responsibilities included cutting timbers and steel and setting up concrete forms for pours. As the local unions requirements prevented the tug captain or crew from handling the lines on the barges, some carpenters also tended the lines on the barges as "scowmen." Morehead's regular duties included both carpentry and linehandling.

On January 29, 1990, Morehead and another carpenter/scowman, Steven Breault, were untying the HUGHES 707 from the CHER 106. A barge was to be surveyed in connection with her going off hire. A tug stood nearby. The barges were not at this time carrying materials or equipment, but rather were set off on the north side of the Davisville Pier. Breault threw a heavy line to Morehead, who, in attempting to catch it, stepped backwards into an open hatch which was flush with the deck on one of the barges. The district court noted conflicting testimony as to which barge Morehead was on when injured,[2] but concluded

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1. Although Woods Hole was originally named as a defendant in this action, the district court granted its motion for summary judgment against Morehead, who has not appealed from that decision. Consequently, Woods Hole is no longer a party.

2. The district court did not definitively find which barge Morehead was on at the time of the accident. The court found "more likely" that Morehead was on the HUGHES 707 and Breault was on the CHER 106, but wrote: "In either event, however, the court would find a single open hatch . . . insufficiently obvious. There would seem a presumption that an unmarked 18 inch opening on an otherwise solid deck is a failure of a reasonably safe proffer to one expected to walk thereon. The court would therefore find the barge, whichever one it was, unseaworthy, but under the statute (33 U.S.C. § 905(b))this is irrelevant."

that in any event, the single open hatch was insufficiently obvious. Breault testified that he had opened the hatch on the HUGHES (which he named as the barge to be surveyed) a few days before the accident, because A-K was preparing for an off-hire survey before returning the barge to the owner. Breault testified that a supervisor carpenter had told him to open the hatch.

Morehead filed a complaint against A-K and Woods Hole on April 22, 1991, alleging Jones Act negligence, unseaworthiness, maintenance and cure, and negligence under section 905(b) of the LHWCA. Following the denial of A-K's motion for summary judgment, Morehead voluntarily withdrew all claims except his claim for negligence under the LHWCA. A bench trial commenced on April 11, 1994. On April 29, 1994, the district court issued its Findings and Order dismissing Morehead's complaint and A-K's cross-claim against Woods Hole. It wrote:

> [T]he court does not find it negligence of [appellee] viewed in its capacity as pro hac vice owner. Rather, it appears to be a temporary condition created by it solely in its capacity as charterer. . . .
>
> These two capacities are legally separate, even though they be the same individual.

This passage confusingly distinguishes between an owner pro hac vice and a bare boat charterer (the statute includes both in its definition of "vessel," *see* 33 U.S.C. § 902(21)). The parties agree that the district court actually meant to distinguish between the appellee as vessel and as employer. We also interpret the district court's order in that fashion.

Judgment was entered on May 4, 1994 in A-K's favor. This appeal followed.

II. Standard of Review

A district court's fact-based findings relative to negligence are reviewable only for clear error. *See, e.g., Levene v. Pintail Enters.*, 943 F.2d 528, 535-36 (5th Cir. 1991), *cert. denied*, 504 U.S. 940 (1992). However, the question of whether the district court applied the proper standard of care is one of law, subject to *de novo* appellate review. *See, e.g., Keller v. United States*, 38 F.3d 16, 22-23 (1st Cir. 1994); *Elberg v. Mobil Oil Corp.*, 967 F.2d 1146, 1149 (7th Cir. 1992).

The district court did not explain the criteria it applied in deciding what duties of care to attribute to A-K in its separate capacities, respectively, as LHWCA employer and as owner (charterer) of the barge. Rather, it simply cited along with its conclusions existing precedent relative to section 905(b) liability, *e.g., Scindia Steam Navigation Co. v. De los Santos*, 451 U.S. 156 (1981), and *Castorina v. Lakes Bros. S.S.*, 758 F.2d 1025 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985). The circumstances and context of these and related cases, however, are too removed for their mere citation to reveal the analysis that the district court applied in this case. Nor does the language of the LHWCA provide clear guidance. We can only hope that the Supreme Court will eventually elucidate the standards applicable to dual status employers of harbor workers in circumstances comparable to these. Until then, we do our best to outline the legal principles that, we believe, govern the facts presented here. Under those principles — and giving due deference to the district court's authority as fact finder — we affirm the judgment below.

Appendix A

III . "Vessel" Status

We briefly discuss first a less troublesome issue. The district court provisionally assumed, without deciding, that the barge on which Morehead was injured was a "vessel" within the LHWCA. Section 905(b) permits an LHWCA employee to sue in negligence only "[i]n the event of injury . . . caused by the negligence of a vessel." Section 902(21) of the LHWCA defines "vessel" to include a bare boat charterer among the parties that may be held liable under section 905(b). A-K does not contest its status as bare boat charterer. Nor has it asserted on appeal that the HUGHES and CHER were not themselves "vessels" under the LHWCA. *See, e.g., Kathriner v. Unisea, Inc.*, 975 F.2d 657, 662 (9th Cir. 1992) (to determine whether a structure is a "vessel" under the LHWCA, most courts have applied the general definition in 1 U.S.C. § 3 of a "watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water"); *accord DiGiovanni v. Traylor Bros.*, 830 F. Supp. 106, 108-09 (D.R.I. 1993). The LHWCA definition of "vessel" is significantly more inclusive than that used for evaluating seaman status under the Jones Act.[3] For present purposes, we may assume that both barges were vessels under the LHWCA, for the negligence of which a section 905(b) claim may be brought.

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3. *See Generally Chandris. Inc. v. Latsis*, 115 S. Ct. 2172, 2192 (1995)(to qualify as a seaman under the Jones Act, "a maritime employee must have a substantial employment-related connection to a vessel *in navigation*"); *Kathriner*, 975 F.2d at 659-63 (applying tests of "vessel" under Jones Act and LHWCA). Plaintiff withdrew his maritime claims, including the claim of Jones Act negligence.

Appendix A

IV. Statutory Framework

The LHWCA establishes a comprehensive federal worker's compensation scheme which holds employers liable, irrespective of fault, for securing the payment of the prescribed compensation to qualified maritime employees injured in the course of their employment. 33 U.S.C. § 904.[4] This liability of employers is termed "exclusive and in place of all other liability of such employer to the employee." *Id.* § 905(a).

Section 905(b) of the Act authorizes certain covered employees to bring an action against the vessel as a third party if their employment injury was caused by the negligence of the vessel.[5] But employees may no longer sue the vessel on a strict

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4. Section 904 provides in relevant part: "(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title . . . . (b) Compensation shall be payable irrespective of fault as a cause for the injury." 33 U.S.C. § 904.

A statutorily covered employee is "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker," except "a master or member of a crew of any vessel" and other limited categories of workers. *Id.* § 902(3).

5. Section 905(b) provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with

(Cont'd)

liability theory for her "unseaworthiness,"[6] Congress having eliminated the latter as a remedy for longshore and harbor workers in the 1972 Amendments to the LHWCA. The 1972

(Cont'd)

> the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. § 905(b).

6. *See* 33 U.S.C. § 905(b). Unseaworthiness is a maritime remedy that was established "simply by showing that some condition or appurtenance on board the vessel at the time of the accident was unreasonably hazardous, even if the stevedore-employer was the sole cause of the hazard." *Keller,* 38 F.3d at 23 (citing *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 94 (1946)).

Amendments require employees to show fault of the vessel, bar a vessel's obtaining of indemnification from the employer, and have increased the worker's compensation recoverable from an employer. *See Addison v. Bulk Food Carriers, Inc.*, 489 F.2d 1041, 1042 (1st Cir. 1974). Focusing on longshore workers who, to date, have been the occupational group chiefly discussed in Supreme Court cases under the LHWCA, the Court described these changes as designed "to shift more of the responsibility for compensating injured longshoremen to the party best able to prevent injuries: the stevedore-employer." *Howlett v. Birkdale Shinning Co.*, 114 S. Ct. 2057, 2063 (1994); *see also Keller*, 38 F.3d at 23.

In the 1984 Amendments to the LHWCA, Congress further narrowed the availability of negligence actions by certain categories of harbor workers against a vessel in circumstances where the employer was also the owner of the offending vessel. In these so-called "dual capacity" cases, Congress barred employees providing "shipbuilding, repairing, or breaking services" from suing the employer-vessel owner for negligence in *any* capacity. 33 U.S.C. § 905(b). The Amendments did not purport to prohibit LHWCA employees other than in the described categories from suing for negligence in dual capacity cases. *See* H.R. Rep. No. 98-570(I), 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 2734, 2741 (hereafter 1984 U.S.C.C.A.N.) ("The Committee intends that this language [in § 905(b)] not be construed to limit an employee's right to bring a cause of action, except in the circumstances indicated within the language."); *cf. Guilles v. Sea-Land Serv., Inc.*, 12 F.3d 381, 386 (2d Cir. 1993) (affirming relief cook's judgment against negligent employer-vessel owner and explaining that "[t]he 1984 change . . . shows that Congress knew how to preclude a class of employees from being able to sue an employer-vessel if it

chose to do so"); *Gay v. Barge 226*, 915 F.2d 1007, 1010 (5th Cir. 1990) ("[T]he § 905(b) bar is specific to the occupations listed: shipbuilders, ship repairers and ship breakers.").

The Supreme Court had previously interpreted section 905(b) to permit covered employees to bring third-party negligence actions against their employer qua vessel owner. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 530-32 (1983) (asserting that if Congress had intended to exempt employer-vessel owners from negligence suits, then the sentence in section 905(b) barring recovery from them where fellow longshore workers caused the injury would have been unnecessary). As Morehead's occupational category does not fall within any of those Congress expressly excepted in the 1984 Amendments, *supra, Jones & Laughlin* would appear under current construction of the statute to allow Morehead to bring a third-party negligence action against A-K in its vessel capacity.[7] To prevail, however, Morehead has to show that any negligence on A-K's part is attributable to it as vessel rather than as Morehead's insured LHWCA employer.

V. Defining the Vessel's Duty of Care: The Supreme Court Cases

As *Jones & Laughlin* allows Morehead to bring a third-party negligence action against a vessel owner even though the latter

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7. The parties have not disputed on appeal that Morehead is a statutorily covered employee of a statutorily covered employer. As a harbor worker with carpentry and linehandling duties, Morehead meets the statutory definition of a covered employee under section 902(3) and does not fall within any of the categories of workers expressly prohibited from suing under section 905(b).

is simultaneously his statutorily-immune employer, we need to find the principles for determining whether the alleged acts of negligence — the open hatch and failure to warn — are attributable to A-K qua vessel owner rather than qua employer. The Supreme Court has indicated that Congress left to the courts the task of defining the vessel's duty of care. *See Howlett,* 114 S. Ct. at 2063 ("Because Congress did not 'specify the acts or omissions of the vessel that would constitute negligence,' the contours of a vessel's duty to longshore workers are 'left to be resolved through the "application of accepted principles of tort law and the ordinary process of litigation." ' ") (citing *Scindia,* 451 U.S. at 165-66).

In *Scindia Steam Navigation Co. v. De los Santos,* 451 U.S. 156 (1981), the Supreme Court considered the duty of care that a vessel owner owed to an injured longshore worker who was employed by an independent stevedoring firm. For this common triangular relationship at least — vessel, stevedore, and longshore worker[8] — the Court held that limiting the vessel's duty of care so as to put the chief responsibility upon the independent stevedore was consistent with Congress' intent to permit third-party negligence actions against the vessel but to eliminate the vessel's no-fault liability (the "unseaworthiness" claim). In *Howlett,* a case that also involved a longshore worker suing an independent vessel, the Court restated the vessel's limited residual duties:

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8. In *Howlett,* the Court suggested that this relationship was the typical one in the longshoring business. *See Howlett,* 114 S. Ct. at 2062 ("The injured longshoreman's employer — in most instances, an independent stevedore, *see Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256 (1979) — must pay the statutory benefits regardless of fault, but is shielded from any further liability to the longshoreman.") (citations omitted).

> The first, which courts have come to call the "*turnover duty*," relates to the condition of the ship upon the commencement of stevedoring operations . . . . The second duty, applicable once stevedoring operations have begun, provides that a shipowner must exercise reasonable care to prevent injuries to longshoremen in areas that remain under the "*active control of the vessel.*" . . . The third duty, called the "*duty to intervene*," concerns the vessel's obligations with regard to cargo operations in areas under the principal control of the independent stevedore.

Howlett, 114 S. Ct. at 2063 (citations omitted) (emphasis added).

This court recently applied these duties in *Keller v. United States*, 38 F.3d 16 (1st Cir. 1994), a case also involving the triangular relationship of vessel, stevedoring contractor, and longshore worker. We described two duties of a vessel prior to "turnover": the "duty to warn" and the "duty of safe condition." *Id.* at 23-24. We further described three "continuing" duties of care:

> First, the vessel owner might remain under such a duty were it to retain actual physical control or custody of a portion of the vessel, or participate in stevedoring operations. *Scindia*, 451 U.S. at 167, 101 S. Ct. at 1622 . . . . Second, a duty to intervene might attach in the event the vessel owner were to acquire *actual knowledge* that

> "unsafe conditions" had *developed* in the vessels appurtenances since turnover, that the stevedore-employer will not address the unsafe condition, *and* that the stevedore's decision not to remedy the developing hazard was "obviously improvident" in the circumstances. *Id.*, at 174-75, 101 S. Ct. at 1625-26. Third, even absent actual control, participation or knowledge, a post-"turnover" duty may arise if the vessel owner was obligated, by contract, statute or custom, to monitor stevedoring operations for the purpose of detecting and remedying unsafe conditions. *Id.* at 172, 101 S. Ct. at 1624-25.

Id. at 32.

Keller affirmed a judgment that an independent vessel owner had breached neither its turnover nor its continuing duties to a longshore worker who had fallen from a ladder on board the vessel. We ruled that the district court had not erred in relying on testimony based on industry standards, which indicated fulfillment of the turnover duty. We also found no breach of a continuing duty of the vessel, where the allegedly dangerous condition developed during cable loading operations which were under the stevedore's control.

As did the Supreme Court in *Scindia,* this court noted the independent stevedore's greater skill and expertise relative to the vessel's, making the former better positioned than the vessel to prevent employee injury, and the traditional stevedoring warranty to perform competently. *See id.* at 29-30; *see also Howlett,* 114 S. Ct. at 2065 ("The rule relieving vessels from this general duty [to exercise reasonable care to discover

dangerous conditions that develop] rests upon 'the justifiable expectations of the vessel that the stevedore would perform with reasonable competence and see to the safety of the cargo operations.' ") (citation omitted); *Scindia*, 451 U.S. at 172 ("[the 1972 Amendments] did not undermine the justifiable expectations of the vessel that the stevedore would perform with reasonable competence and see to the safety of the cargo operations"). Further supporting the vessel owner's justifiable reliance on the stevedore is that the latter is "subject to detailed legislative and administrative prescriptions for affording its workers a 'safe' workplace." *Keller*, 38 F.3d at 24 (citing 33 U.S.C. § 941 and accompanying regulations, 29 C.F.R. §§ 1918.1-1918.106, § 1918.25, and *Scindia*, 451 U.S. at 170) .

In *Scindia* and *Howlett* the Supreme Court, as noted, outlined a vessel owners duties of care relative to a longshore worker employed by an independent stevedore.[9] But the Supreme Court has not yet had occasion to analyze the vessel's duties in a dual capacity case.[10] Nor has the Court considered to what degree its *Scindia* analysis applies to non-longshoring harbor workers, whose duties and modus operandi often differ considerably from those of longshore workers.[11] The Court has said, though, that

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9. Other courts have applied *Scindia* duties to LHWCA-covered employees other than longshore workers in the familiar tripartite context. *See, e.g., Elberg*, 967 F.2d at 1149-50 (welder); *Teply v. Mobil Oil Corp.*, 859 F.2d 375, 377 (5th Cir. 1988) (worker at barge-accessible oil well).

10. In *Jones & Laughlin*, the negligence of the dual capacity defendant qua vessel had been conceded.

11. Longshore workers such as those in *Scindia* typically load and unload cargo ships that are operated full-time by a master and crew. Vessel negligence can often be distinguished from stevedore negligence by

(Cont'd)

"[o]f course, [section 905(b)] does make it clear that a vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its 'stevedore' [the insured employer] capacity." *Jones & Laughlin*, 462 U.S. at 531 n.6.

How to distinguish between vessel owner negligence and employer negligence — where the same entity is both vessel owner and employer — is key here, because Morehead's statutory right to sue is solely for injury caused by the vessel negligence of a vessel as third-party. For other work injuries within the scope of his employment, the LHWCA expressly provides that he must accept the worker's compensation prescribed under the LHWCA as "exclusive and in place of" all other employer liability. 33 U.S.C. § 905(a).

A further matter complicates this case: as the defendant has two capacities, so too, it might be said, does the plaintiff. Morehead was a carpenter, but was hired to perform both carpentry and scowmen's duties. A-K did not employ a separate

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determining to what extent the dangerous condition was caused, or allowed to persist, by reason of the neglect of the vessel's crew rather than of the stevedoring employees. Harbor workers, however, may work (as here) on construction barges that are moved about by tugs and have no fully-dedicated professional crew as such. As part of their employment, the harbor workers may do whatever is needed from time to time to tend lines and service the barges, besides performing construction duties as carpenters, electricians, or the like. Thus, assessing what responsibilities fall within the purview of the *vessel's* duty of care, as distinguished from the employers, can be an elusive quest.

crew on its barges.[12] As we will discuss further below, this "*double* dual capacity" aspect of the case is a factor to be considered in determining whether negligent acts are properly attributable to a defendant as vessel.[13]

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12. As noted, the tugs that towed the barges were captained and crewed by employees of Woods Hole, which supplied the tugs. These employees did not handle the lines on the barges; under union rules, only carpenters/scowmen employed by A-K (such as Morehead) did.

13. This mix of responsibilities might, in other cases, expand the range of possible remedies available to an injured employee, who must then choose between the mutually exclusive regimes of the LHWCA and Jones Act. *See Chandris*, 115 S. Ct. at 2183-84 (citing *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347 (1991)). In *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991), the Supreme Court held that a shipyard rigging foreman — who handled lines connecting floating platforms to vessels under repair — was not precluded as a matter of law from seeking a tort remedy under the Jones Act merely because ship repairers are among those jobs specifically enumerated under the LHWCA. *See id.* at 89 ("By its terms the LHWCA preserves the Jones Act remedy for vessel crewmen, even if they are employed by a shipyard. A maritime worker is limited to LHWCA remedies only if no genuine issue of fact exists as to whether the worker was a seaman under the Jones Act.").

Morehead withdrew his Jones Act claim, presumably because he did not believe he could establish Jones Act seaman status. Nonetheless, Morehead has attempted to focus our attention on the vessel-type responsibilities that Breault performed in the period before the injury, as discussed *infra*. While an emphasis on vessel-type duties may be appropriate for the fact-specific inquiry into seaman status, we place little weight on this attempt to bifurcate vessel and construction activities when these workers were hired to perform both. The definition of a covered employee under the LHWCA excludes "a master or member of a crew of any vessel." 33 U.S.C. § 902(3). It seems inconsistent with this exclusion for Morehead to buttress his claim under the LHWCA with arguments portraying a fellow employee, Breault, as if he were a member of the crew of the vessel. *See infra*.

Appendix A

VI. Lower Court Precedent

While the Supreme Court has said little about dual capacity cases beyond giving approval to the suing of dual capacity defendants in their vessel owner capacity, some circuits have decided cases similar to ours. They have asked whether the alleged negligence was due to the defendant qua employer or qua vessel, with recovery allowed only in the latter instance. And, principles borrowed from *Scindia* have been applied to harbor workers as well as longshore workers.

Applying *Scindia* to a dual capacity defendant raises questions even in the longshoring context. For example, if a defendant is aware of a defect in the work area as stevedore employer, should such awareness also be attributed to it as vessel owner? And as we note *supra, Scindia* and *Keller* emphasized a vessel owner's reliance upon the presumed expertise of the stevedore, an independent contractor. Where the vessel owner is also the stevedore, is it reasonable to attribute such reliance?

Concerns of this nature led the Second Circuit in *Fanetti v. Hellenic Lines Ltd.*, 678 F.2d 424 (2d Cir. 1982), *cert. denied*, 463 U.S. 1206 (1983), to indicate that a longshore worker's claim against a dual capacity defendant would be analyzed differently from a claim against a separate shipowner brought by the employee of an independent stevedore. In *Fanetti*, a longshore worker was injured on deck by an unsafe condition. The dual capacity defendant argued that 1) in its role as employer-stevedore, it was primarily responsible for the safety of the workplace, and 2) as vessel owner, it should be able to rely upon its expertise as stevedore, thereby avoiding liability as vessel for the negligence.

Appendix A

The Second Circuit rejected the defendant's attempt to escape liability in negligence as vessel by seizing its "employer hat." Relying on a dissent by Judge Friendly in *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682, 687 (2d Cir.) (Friendly, J., dissenting), *cert. denied*, 439 U.S. 929 (1978), the court of appeals ruled that a vessel assumes a *greater* duty of care when there is no *independent* employer responsible for workplace conditions, upon whom the vessel owner may rely to oversee the safety of the workplace on board. *See Fanetti*, 678 F.2d at 428 (citing *Canizzo*, 579 F.2d at 689-90).

Rearranging duties of care as in *Fanetti* raises serious problems, discussed hereafter, by enlarging an employers tort liability beyond the purposes of the 1972 Amendments. *Cf. Howlett*, 114 S. Ct. at 2063. *Fanetti*, moreover, was decided before *Jones & Laughlin* was handed down in the Supreme Court. We do not think that the Second Circuit today would endorse *Fanetti's* broadened duty of care, given the Supreme Court's remark "that a vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its 'stevedore' capacity." *Jones & Laughlin*, 462 U.S. at 531 n.6. This comment suggests that the Court expected the limited vessel liability in *Scindia* to carry over to dual capacity situations as well. No later case from the Second Circuit, nor from any other circuit, has been called to our attention following *Fanetti's* enlargement of a vessel's duty in a dual capacity situation.[14] *Cf.*

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14. *Fanetti* might have reached the same result of vessel liability without applying a broader duty of care. The defendant did not dispute that the vessel's crew created the hazard while performing work unrelated to longshoring operations. *See Fanetti*, 678 F.2d at 426. In this situation, the defendant qua vessel arguably had active control over the crew and knew or should have known about the injury-causing actions, making it liable even under the *Scindia* standards.

Guilles, 12 F.3d at 383, 387 (a recent Second Circuit decision citing Fifth Circuit authority contrary to *Fanetti* and ruling only that a valid cause of action under section 905(b) existed, where the parties had stipulated to the vessel's negligence). Whether or not termed dicta, we do not feel free to overlook the Court's statement in *Jones & Laughlin.*

Contrary to *Fanetti*, the Fifth Circuit, which has decided a great number of LHWCA cases, has allocated the same vessel duties of care to dual and single capacity defendants. It regards this approach as in keeping with the Supreme Court's limiting of a vessel's duty of care (*e.g., Scindia* and *Jones & Laughlin),* and with Congress' intent to provide injured workers the same remedies, regardless of whether their employer or another happens to be the legal owner of the vessel.[15]

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15. Other courts have followed suit. *See, e.g., Halpin v. Atkinson-Kiewit, J.V.,* 894 F. Supp. 486 (D. Mass. 1995) (applying *Scindia* duties and denying defendant's motion for partial judgment on the pleadings); *DiGiovanni v. Travlor Bros.,* 855 F. Supp. 37 (D.R.I. 1994), *appeal docketed,* No. 94-1775 (1st Cir. July 27, 1994) (finding no violation of *Scindia* duties where hazard was obvious following "turnover" of the vessel, defendant as vessel lacked "active control" over or knowledge of leak from equipment placed aboard for employment operations, and the circumstances did not give rise to a duty to intervene); *Koernschild v. W.H. Streit, Inc.,* 834 F. Supp. 711 (D.N.J. 1993) (applying *Scindia* duties and denying summary judgment to the defendant where factual dispute existed concerning the plaintiff's awareness of the hazard); *Coats v. Luedtke Eng'g Co.,* 744 F. Supp. 884 (E.D. Wisc. 1990) (deeming "employer" responsible for providing employee a safe passageway to his job on the vessel, and granting summary judgment to the defendant given its lack of "active control" as vessel over a condition off-board the vessel).

Appendix A

The seminal Fifth Circuit case was *Castorina v. Lykes Bros. S.S.*, 758 F.2d 1025 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985). There, a longshore worker exposed to asbestos during cargo operations alleged that his employer-vessel owner knew of the harm qua vessel and failed to make the vessel safe. The Fifth Circuit stated that the LHWCA compensation scheme "requires us to separate the negligence of the shipowner and that of the stevedore, even when the shipowner performs its own stevedoring activities." *Id.* at 1033. Noting that the alleged harm had arisen during stevedoring activities, the court refused to impute any knowledge of this danger by the employer to it as vessel. It explained:

> To impute this knowledge to a shipowner-employer would be to hold it liable in tort for damages arising from its negligence as stevedore, and effectively to eliminate the exclusivity provisions of sections 905(a) & (b). This result is contrary to the language and purpose of the Act as amended. We therefore hold that the duty owed by a shipowner to a longshoreman under section 905(b) is that established by *Scindia* and its progeny; this duty is neither heightened nor diminished when the longshoreman is employed directly by the vessel.

Id.; accord Tran v. Manitowoc Eng'g Co., 767 F.2d 223, 228 (5th Cir. 1985).

On the facts of *Castorina*, it was relatively easy to apply the *Scindia* standard to the shipowner-employer. In a later case, the Fifth Circuit applied *Scindia* in a more complex situation

involving a harbor worker. In *Levene v. Pintail Enters.*, 943 F.2d 528 (5th Cir. 1991), *cert. denied*, 504 U.S. 940 (1992), the injured employee was a heavy equipment operator who performed other maritime tasks as well. A captain had instructed Levene to untie another owner's barge, which blocked access to the particular barge they had been instructed to pick up. Levene was injured on the other owner's barge, where grease and scrap materials were present on the deck. *See id.* at 530.

Applying the *Scindia* duty of turnover and the duty arising from active control over a dangerous condition, the *Levene* court rejected the employee's claim. The court explained that *Scindia* did not mandate "extending the duty of a shipowner to protection against hazards on another ship." *Id.* at 534. "[W]e decline to fashion a general standard of 'reasonable care' that would require a shipowner to protect against any and all hazards a longshoreman might encounter in the course of his work." *Id.* Further, the court did not view "the fleeting contact between Pintail [the employer-vessel owner] and the BB-242 [the separate owner's barge] as the kind of control that could result in a finding of liability." *Id.* at 535. It noted that the duty arising from active control over a hazardous condition may be triggered when the dangerous condition is on the vessel itself. *See id.* (discussing *Masinter v. Tenneco Oil Co.*, 867 F.2d 892, 896-97 (5th Cir. 1989), a non-dual capacity case in which the vessel crew was solely responsible for placing a stairway in a way that caused injury to a worker, and the vessel was "*contractually bound* to conduct the drilling operations and remained in control of the vessel to effectuate this obligation"). Even though the captain "temporarily was in 'command' " of both the vessel and the separate owner's barge, the court found that this did not rise to the level of active control required. *Id.*

Appendix A

VII. Resolving This Case

We agree with the Fifth Circuit, for similar reasons, that the duties of care described in *Scindia* should be applied in dual capacity cases insofar as the facts allow. To do so, a court may have to divide the employer-shipowner into a hypothetical independent employer and independent vessel owner, each separately holding the duties allocated under principles suggested in *Scindia.* A court may sometimes be assisted in this process by the defendant's internal employment arrangements assigning certain personnel to the "vessel" side of its operation. On occasion, however, the duties and work arrangements pertaining to a suing harbor worker may be so foreign to those in *Scindia's* stevedoring context that *Scindia's* analysis will become no more than a point of departure. Nonetheless, *Scindia's* general approach, at least, can be followed and, in many cases, some or all of its express analysis may be useable.

The statutory language and the legislative history of the 1972 and 1984 Amendments plainly evidence Congress' intent that the workers compensation scheme be the primary remedy for all covered workers, regardless of an employer's commercial practice in regard to vessel ownership. *See* 33 U.S.C. § 905(a) (exclusiveness of employer's liability); 1984 U.S.C.C.A.N. at 2740 ("In the Committee's view, the Longshore Act should be the *primary* source of compensation for covered workers who are disabled or who may die as a result of a job-related injury or disease.") (emphasis supplied); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 4698, 4705 ("[T]he bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services . . . . The

Committees intent is that the *same principles* should apply in determining liability of the vessel which employs its own longshoremen . . . as apply when an independent contractor employs such persons.") (emphasis supplied). The 1972 Amendments carefully balanced the concerns of employers, vessels, and covered workers. We are not disposed to upset that balance by expanding the liability of employers that act simultaneously as vessel owners, when the statute does not call for such a reading and the Supreme Court has cautioned against it.

As already observed, *Scindia* will sometimes afford less direct guidance on those duties owed to harbor workers than it does on those owed to longshore workers. Courts will need to decide, on a case-specific basis, whether the harbor worker's employment arrangement sufficiently resembles that in *Scindia* to make particular specifics germane.

Here, the employment arrangement is sufficiently analogous to make *Scindia* a useful guide. The *Scindia* Court reasoned that once longshore workers came aboard and began carrying out their cargo duties under a stevedores supervision, the vessel itself had no general duty to exercise reasonable care to inspect for unsafe workplace conditions; rather, it could rely on the longshore worker's employer to do so. *See Scindia*, 451 U.S. at 172. Here, A-K hired harbor workers through the local carpenters' union and, as their employer, supervised them as they tended the barges, handling the lines and carrying out construction activities thereon. Both types of activities — construction and scowmen's work — were assigned to them and were performed for A-K qua employer. Workers like Morehead received their daily instructions from A-K's carpenter-foremen, while A-K's project safety manager met periodically with them

to discuss site-specific safety issues. Therefore, *Scindia's* principle of limited liability of the vessel sensibly and logically applies, because the employees effectively assumed control of the barges working under A-K in its capacity as their employer. A-K qua shipowner had no separate captain and crew assigned to the barge. The allegedly negligent conditions (the open hatch and the absence of warnings) were not attributable to the errors of separate maritime agents acting specifically for the vessel. Rather the alleged acts of negligence were those of fellow harbor workers acting within the scope of their daily employment for the employer. *Cf.* 33 U.S.C. § 905(b) (prohibiting liability of an employer-vessel owner for acts "caused by the negligence of persons engaged in providing stevedoring services to the vessel").

Morehead does not assert any breach of the *Scindia* "turnover" duty (*e.g.*, that A-K, as vessel owner, turned over the barge to the harbor workers knowing or with the duty to have known, of some defect in the barge that later caused injury). Morehead argues only that we should deem that A-K as vessel violated duties it owed him because, at the time he was injured, A-K as vessel (rather than A-K as employer) is asserted to have had "active control" over or "actual knowledge" of the open hatch. *Cf. Howlett,* 114 S. Ct. at 2063 (noting appellant confined arguments to breach of turnover duty to warn); *Elberg,* 967 F.2d at 1150 (noting appellant confined arguments to breach of duty to intervene). Equating employment for worker's compensation purposes solely with construction activity, he asserts that no construction purpose, hence no employment purpose, was being pursued at the time of his injury. He draws support from the district court's findings that the barges were set alongside the pier and were not carrying construction equipment. Morehead emphasizes that A-K had instructed Breault to open the hatch to air the barge out so that A-K could exercise what Morehead

argues was a vessel function having a marine surveyor examine the barge before returning it to the owner. He further claims that A-K's safety manager or other carpenter foremen knew or should have known that the open hatch was a potentially hazardous condition. Resting on purported agency principles, Morehead asks us to assign these employees' acts to A-K in its vessel capacity, on the theory that A-K in its vessel rather than employer capacity had control over or knowledge of the open hatch and the failure to warn about it.

A-K responds that Breault was performing employment duties when he opened the hatch and when he threw the line to Morehead before the accident. Like Morehead, Breault had been hired both for carpenter and scowman duties. As typical in the case of harbor workers, as distinct from land-based carpenters, the men were expected as part of their employment duties to lend a hand with supporting maritime chores as well as to pursue their particular construction trade. A-K maintains that its "active control" over or knowledge about the open hatch into which Morehead fell is therefore attributable to it as employer, not as vessel since the hatch was opened (presumably by Breault) and the line thrown in the course of harbor worker duties which both men were regularly hired to perform.

We agree with A-K that, for present purposes, the barges tended by its carpenters/scowmen were operated within A-K's control and knowledge *qua employer.* The barges, which were Breault and Morehead's workplace, can be analogized to the areas of a vessel taken over by longshore workers in the *Scindia* setting. Under the principles of that case, the stevedore — or, in a dual capacity case, the employer in a stevedore capacity — is ordinarily liable for the safety of the workplace and for any injuries that occur. The vessel, or the employer in its vessel

capacity, is not implicated except in the unusual circumstance that the vessel itself continues to exercise active control over the work area.

We recognize that a competing analysis is possible, which, however, we reject. A court could make an attempt to ascribe Breault's and Morehead's specific activities relative to Morehead's injury either to their employer or to the vessel, depending on how the court chose to classify the objectives that those activities were thought to serve. One could inquire whether the hatch was opened to "help" the vessel (*i.e.*, to air it in preparation for returning it to the owner) rather than in furtherance of some construction activity. If so, the defendant qua vessel might be held liable for any negligence. Such an analysis, however, would involve courts in slippery semantical debate. Is an accident while tying up a barge at a construction site in furtherance of a "constructions objective or a "vessel" objective? If both objectives are being served, which predominates? And how does one square the fact that the employees here were hired by the employer for scowmen not just carpenter duties? Harbor workers are, after all, by definition, employees whose paid duties include maritime components.

As noted, the statute makes the employer's worker's compensation liability "exclusive and in place of all other liability . . . ." 33 U.S.C. § 905(a). The legislative history and the Court's precedents since 1972 make worker's compensation the primary remedy for an injured employee. The exception in section 905(b) for third-party negligence, narrowed in 1984,[16] explicitly requires

16. *Cf. Roach v. M/V Aqua Grace*, 857 F.2d 1575, 1580 (11th Cir. 1988) ("While this [1984] amendment does not disturb the holding of *Jones & Laughlin Steel Corp.*, it does indicate a Congressional intent to limit invocation [sic] of the dual capacity doctrine under the Act.").

a finding of *vessel* fault. We would be disregarding Congressional intent and might even be returning in the direction of the *Sieracki* doctrine which did not require such a showing, *see supra* n.6, if we were to attribute some of the regular duties that a harbor worker is employed to perform to the vessel, because of their speculative seaman-like character, and only the residue to the employer. This approach would greatly expand a defendant's liability qua vessel in a work arrangement not too different from that in *Scindia, i.e.,* one where the employees have effectively taken over the vessel to carry out their employment duties under their employer's supervision. A similar expansion of liability would follow from too easily assigning any knowledge acquired by A-K employees in the regular course of employment (such as the carpenter foremen or worksite safety manager) to A-K in a vessel capacity. Neither the statute nor case law supports such an approach, which, on the present facts, would leave this worker's compensation statute as a strange hybrid combining mandated compensation coverage with a widespread license for covered employees to sue because of the negligence of their supervisors and fellow employees within the workplace.

One of the essential purposes of the 1972 and 1984 Amendments was to provide employees and employers with a greater degree of certainty as to the coverage in effect. The legislative history of the 1984 Amendments documents this concern:

> [T]he situation in which a worker may be covered at one time, and not covered at another, depending on the nature of the work which the worker is performing at the time of the injury must be avoided since such a result would be enormously destabilizing, and

> would thus defeat one of the essential purposes of these amendments.

1984 U.S.C.C.A.N. at 2736-2737. A "functional" interpretation, hinging the type of liability on the nature and purpose of the duties being performed by covered employees at any given time, would increase uncertainty and the frequency of disputes over the scope of coverage. As Morehead's and Breault's employment contemplated that they would alternate frequently between construction and linehandling, a single, overall classification of their duties is most appropriate for determining the types of remedies available. *Cf. Gay,* 915 F.2d at 1011 ("[T]o deny Gay [the employee] a cause of action in the morning but to grant him one in the afternoon is to make his rights under the Act as random and indiscriminate as the sea herself. This sort of incertitude is precisely what Congress attempted to eliminate from the LHWCA in both its 1972 and 1984 amendments.) (footnote omitted); *cf. Chandris*, 115 S. Ct. at 2187 ("In evaluating the employment-related connection of a maritime worker to a vessel in navigation, courts should not employ 'a "snapshot" test for seaman status, inspecting only the situation as it exists at the instant of injury'. . . . [A] worker may not oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker was engaged while injured.") (citations omitted).

Cases will, of course, arise from time to time involving an injury that was negligently caused by someone acting as the agent of the vessel owner rather than of the employer.[17] Here, however,

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17. *Cf. Pichoff v. Bisso Towboat Co.*, 748 F.2d 300, 302-03 (5th Cir. 1984) (ruling in a dual capacity case that a general manager who ordered a hurried inspection of a fuel tank leak and failed to provide adequate lighting was acting as an agent of the vessel).

we see nothing requiring the district court to find that Breault, in leaving open the hatch, acted in any capacity other than as Morehead's fellow employee pursuing assigned harbor worker duties rather than as A-K's agent in its distinct shipowner's capacity. Morehead and Breault were hired to perform both construction and scowmen duties. A carpenter-supervisor instructed Breault to open the hatch. A-K's project safety manager generally oversaw the safety of work operations. Morehead has not shown why, in these circumstances, A-K in its district capacity as owner of the vessel rather than as his employer, may have breached a duty of care to protect him against the open hatch.

We conclude that the district court correctly viewed the open hatch as a condition temporarily created by A-K as employer, and affirm the district court's judgment in favor of A-K.

So ordered.

— Concurring Opinion Follows —

SELYA, *Circuit Judge* (concurring). Under existing Supreme Court precedent, this is a close and a vexing case. A large part of the problem is that the Court's language in *Jones Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 530-32 & n.6 (1983) — whether deemed a holding or a considered dictum — forces judges who are called upon to decide "dual capacity" LHWCA cases to engage in a legal fiction, pretending that a single entity (the injured person's employer) is really two distinct and separable entities (employer and vessel owner *pro hac vice*). In my view, this self-induced schizophrenia muddles the law and disrupts the delicate balance that Congress labored to strike between the entitlement of stevedores and others similarly situated to workers' compensation benefits, and the entitlement of employers who provide that coverage to immunity from negligence suits. In short, I believe that Congress should have been taken literally when it wrote that an employer's responsibility to furnish workers' compensation benefits under the LHWCA is "exclusive and in place of all other liability of such employer to the employee." 33 U.S.C. § 905(a).

This reasoning leads me to conclude, with all respect, either that Congress inadvertently muddied the waters in phrasing LHWCA § 905(b), or, alternatively, that *Jones & Laughlin* was wrongly decided. Still, I recognize that the Supreme Court's opinion is binding on this court, and that we therefore must undertake what Judge Campbell charitably terms "an elusive quest." *Ante* at note 11. Once reconciled to that necessity, I can in good conscience join this court's cogent opinion. I write separately, however, to urge the Supreme Court and Congress to reflect upon the mind games that *Jones & Laughlin* — particularly as applied to harbor workers — compels us to play, and, hopefully, to revisit the question of whether "dual capacity" employers should be liable at all in negligence actions brought by their employees.

— Dissenting opinion follows —

Appendix A

CYR, *Circuit Judge* (dissenting). As I am in fundamental disagreement with the treatment given the duties of care incumbent upon dual capacity LHWCA employers by the en banc court under the Supreme Court decision in *Scindia,* I respectfully dissent.

I.

Two years after its seminal decision in *Scindia, see supra* Section V (en banc opinion), the Supreme Court held that an injured longshore worker who receives LHWCA compensation benefits is not barred from bringing a negligence action against his vessel-owner employer under section 905(b), notwithstanding the seemingly unqualified "exclusivity" provision in section 905(a) that the sole liability to which maritime employers may be subjected is LHWCA compensation benefits. *See Jones & Laughlin,* 462 U.S. at 530-31; *see also supra* note 5 (en banc opinion). Beyond the conclusive contextual support for this holding, the relevant legislative history confirms a congressional intendment "that the rights of an injured longshoreman . . . should not depend on whether he was employed directly by the vessel or by an independent contractor." *Jones & Laughlin*, 462 U.S. at 531-32 (quoting H.R. Rep. No. 92-1441).[1]

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1. The full House Report excerpt states:

> The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S.S. Yaka,* 373 U.S. 410 (1963), and *Jackson v. Lykes Bros. Steamship Co.,* 386 U.S. [731] (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of

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Appendix A

Without further elaboration, the *Jones & Laughlin* Court appended a conclusory footnote ("footnote 6") to its holding: "Of course, § [905(b)] does make clear that a vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its 'stevedore' capacity." *Id.* at 531 n.6. The en banc court interprets footnote 6 as the Supreme Court's endorsement of a legal fiction central to the present controversy: a dual capacity employer engaged in maritime construction presumptively operates in two wholly discrete capacities (i.e., vessel owner and construction company). I respectfully disagree.

First, footnote 6 is unelucidated dictum. *See Dedham Water Co., Inc. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 459

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> an injured longshoreman or ship builder or repairman should not depend on whether he is employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to shipbuilding or repair employees employed directly by the vessel. ***The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.***

H.R. Rep. No. 92-1441, 92d Cong., 1st Sess. 7-8, *reprinted in* 1972 U.S.C.C.A.N. at 4705 (emphasis added).

(1st Cir. 1992) ("Dictum constitutes neither the law of the case nor the stuff of binding precedent."). Although great deference normally is accorded considered Supreme Court dicta, *see, e.g., Bank of New England Old Colony, N.A. v. Clark*, 986 F.2d 600, 603 (1st Cir. 1993), the only question of statutory interpretation confronting the Court in *Jones & Laughlin* was whether the LHWCA imposed *any duty of care at all* upon dual capacity vessel owners, since the parties were in agreement that the defendant vessel owner would be liable for its negligent conduct absent any such *per se* immunity prescribed by statute.[2] Not only did the parties in *Jones & Laughlin* not brief the complex legal issue presently before us, but there is no exegetic discussion — either in footnote 6 or elsewhere in the *Jones & Laughlin* opinion — of the legal issue itself, the LHWCA's legislative history, or supportive Supreme Court precedent. *See Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 2370 (1994) (rejecting Court's own dictum in prior opinion which "had no cause to address, and did not carefully consider, the damages question before us today").

More importantly, even if footnote 6 were to be considered binding precedent, its curt conclusion begs the essential question: in defining the duties of care, how are the courts to determine in what conditions particular negligent conduct is to be considered traceable to a dual capacity employer *qua* vessel owner? Far from creating or endorsing a presumptive legal fiction, footnote 6 may simply impart the Court's view that a dual capacity employer in some future case might yet be able to demonstrate an efficient bifurcation of its statutory duties of care under the

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2. Longshoreman Pfeifer had slipped and fallen while on board a barge owned by his employer, which had "negligently failed to remove [ice] from the gunnels." *Jones & Laughlin*, 462 U.S. at 526.

LHWCA. The current circuit split on this issue thus indicates at the very least that the legal fiction purportedly endorsed by footnote 6 has not won universal acceptance in the lower courts.

The Fifth Circuit has accepted footnote 6 as evidence that the Supreme Court meant to endorse an artificial legal construct deemed central to the LHWCA's integrity as a prototypical workers' compensation statute. *See Levene*, 943 F.2d at 531 (citing *Castorina*, 758 F.2d at 1032-33 (noting: since legislative history contemplates that all maritime employees receive the "same" remedy, "[w]e can find no reason to impose on a shipowner a greater duty of care toward longshoremen because the shipowner conducts its own stevedoring operations")). That is to say, a contrary construction of section 905(b) would deprive dual capacity employers of their anticipated return for assuming the burden of contributing to the section 904 workers' compensation scheme.

The Second Circuit, on the other hand, has pointed out that attempting to fit dual capacity employers into the traditional *Scindia* mold causes serious anomalies and artificialities not present in single capacity cases. *See, e.g., Fanetti*, 678 F.2d at 428 ("[A] [jury] charge which relieves a shipowner of liability for a dangerous condition which was 'known to the stevedore or to any of its employees' is clearly inappropriate where the shipowner, itself, is the stevedore.' ") (quoting *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 508 (2d Cir. 1976)). For example, as the Second Circuit observed:

> *Where . . . there is no independent contractor, it is part of the ship's duty to exercise reasonable care* to inspect its own workers' workplace, to remove grease spills, etc. In

> such a case there is no "independent contractor" with primary responsibility upon whom the ship may properly rely .... Things are very different when the longshoreman works for an independent stevedore who has primary responsibility for the workplace.

Id. (quoting *Canizzo*, 579 F.2d at 689-90 (Friendly, J., dissenting, in part)) (emphasis added). Although *Fanetti* preceded *Jones & Laughlin*, whereas the *Castorina* decision came after, there is no indication that the Second Circuit has altered its position.[3]

II.

The en banc court embraces the presumptive "bifurcation" approach adopted in *Castorina* out of concern that the *Fanetti* option would eviscerate the 1972 LHWCA amendments' principal purpose: to offer all maritime employers maximum protection from unpredictable tort liability in return for their fixed monetary contributions to the LHWCA compensation fund. *See also DiGiovanni v. Traylor Brothers, Inc.*, 855 F. Supp. 37, 42 (D.R.I. 1994) (same, citing by analogy to "exclusivity"

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3. The en banc court notes that the *Fanetti* panel need not have announced so broad a statement of the duties incumbent upon dual capacity employers. *See supra* note 14 (en banc opinion). In my view, this overlooks the purposes served by such statements: first, to explicate the court's rationale through reference to potential anomalies and inequities which might otherwise be thought to undermine its rationale; second, to provide guidance on remand. *See, e.g., Scindia*, 451 U.S. at 156 (setting forth complete explication of duties of care for remand, some arguably inapposite to record facts). No Supreme Court or Second Circuit case either explicitly or implicitly overrules *Fanetti*. *Cf. Guilles*, 12 F.3d at 387 (citing *Levene* only for the limited proposition that non-longshore workers not specifically barred by the 1984 LHWCA amendments — like harbor workers — may bring suit against their dual capacity employers under the *Jones & Laughlin* reasoning); *cf. also supra* Section VI (en banc opinion).

provision in Rhode Island Workers' Compensation Statute, *see* R.I. Gen. Laws § 28-29-20 (1994)). Accordingly, the en banc court views the bifurcation fiction as the only means of achieving the congressional goal "that the rights of an injured longshoreman . . . should not depend on whether he was employed directly by the vessel or by an independent contractor." H.R. Rep. No. 92-1441 (noting that the "same principles should apply in determining the liability of the vessel" in both single capacity and dual capacity cases). I find its reasoning unpersuasive.

First, though courts must attempt to discern legislative intent based on the statute as a whole, *see Thinking Machs. Corp. v. Mellon Fin. Servs. Corp.*, 67 F.3d 1021, 1024 (1st Cir. 1995), nothing in the LHWCA or its sparse legislative history provides conclusive support for the "evisceration" argument adopted today by the en banc court. As single capacity employers would continue to retain all their section 905(a) protections, the *Fanetti* approach may limit some employers' LHWCA immunity but it certainly does not render the LHWCA exclusivity provision superfluous. *See Mosquera-Perez v. INS*, 3 F.3d 553, 556 (1st Cir. 1993) (no statutory provision should be interpreted as meaningless).

Second, *Jones & Laughlin* itself demonstrates that the supposedly unlimited, pro-employer exclusivity provision in section 905(a) is far more flexible than the land-based workers' compensation statutes in most states, which in comparable contexts would not permit a worker to bring a negligence action against the employer as owner of the property on which the worker's injury occurred. *See generally* 2A Arthur Larson, *Workmen's Compensation Law* § 72.82, at 14-234 (1983).[4] Thus,

4. Many states do recognize a dual capacity doctrine — though in circumstances inapposite here — where the employer acts in a *non-landowner* (Cont'd)

it seems reasonably clear that Congress did not envision section 905 as an exact analog to state workers' compensation schemes.

Third, the cited House Report language appears immediately after a discussion of Congress' intention to abrogate the Court's previous decisions in *Reed v. Yaka,* 373 U.S. 410 (1963), and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 731 (1967), *see supra* note 1, which held that dual capacity employers were as vulnerable to "unseaworthiness" claims under the pre-1972 LHWCA as were non-employer vessel owners. Congress meant to eliminate the wasteful litigation burdening the courts under the pre-1972 LHWCA; viz., the "triangulation" in litigation caused by the confluence of a longshore worker's strict liability claim for "unseaworthiness" against the vessel owner and the vessel owner's claim for indemnification from a negligent stevedore-employer.

Thus, in all likelihood the House Report's reference to "same principles" was simply meant as a caution that henceforth, by virtue of the 1972 amendments, both single capacity and dual capacity cases were to be subject to the same negligence liability principles, not to the heightened standards of care governing "unseaworthiness" claims — a differential that would otherwise have afforded employees in dual capacity cases a decided *advantage* in litigation. *See, e.g., Shaw v. North Pennsylvania R. Co.*, 101 U.S. 557, 565 (1879) ("No statute is to be construed

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capacity. For example, a worker injured by a product manufactured by the employer would not be barred from bringing a product liability claim for breach of the duty — owed the consuming *public* — to make a reasonably safe product. *See, e.g., Schump v. Firestone Tire & Rubber Co.*, 541 N.E.2d 1040, 1042-43 (Ohio 1989).

as altering the common law further than its words import.") . Therefore, even without indulging the "bifurcation" fiction adopted by the en banc court, it is entirely reasonable to point out that dual capacity employers, in return for assuming much more limited section 904 workers' compensation liability, obtained an important benefit from the 1972 amendments; that is, complete insulation from the much more onerous strict liability to which they had been exposed previously in actions for breach of the warranty of seaworthiness.

Fourth, Congress may well have envisioned different duties of care for single capacity and dual capacity employers. Unlike their single capacity counterparts, dual capacity vessel owners presumably derive economic benefit as a result of their decision to act in a dual capacity. In fact, this economic benefit itself may well counterbalance any "heightened" duty of care attending their decision.

> A shipowner is, of course, at liberty to refrain from hiring an independent stevedoring contractor. Presumably it does so to save money. However, that saving is accomplished at the cost of not having an independent expert on board. As myriad cases in this field demonstrate, the presence of the expert independent stevedoring contractor furnishes the shipowner with significant protection, in the form of insulation from liability for its own acts which would otherwise attach. But *the shipowner cannot save the premium and still claim the protection.*

Fanetti, 678 F.2d at 428 (emphasis added).

Appendix A

Indeed, permitting the dual capacity employer to compartmentalize its actual "knowledge" between its two artificial personae in these circumstances would undercut the primary LHWCA policy goal identified in *Scindia*. That is to say, there would be no economic incentive for shipowner-employers to hire independent stevedoring companies, which generally possess greater expertise in conducting longshoring activities with maximum levels of worker safety. Such an artificial rule inevitably would increase the hazardous working conditions encountered by longshore and harbor workers, and thereby undermine the spirit of the LHWCA.

Fifth, the en banc court's bifurcation fiction obviates any factfinding inquiry into the "dual capacity" employer's actual mode of operations. Under either *Fanetti* or *Levene*, single and dual capacity employers are subject to the "same" standards of care; the differences are purely circumstantial. The *Scindia* paradigm recognizes that a single capacity vessel owner is subject to comparatively relaxed duties of care because it forfeits virtually all control over ensuing events once it turns its vessel over to another legal entity (and that entities employees) in relation to which the vessel owner enjoys no presumptive right of control absent specific contractual arrangements to the contrary.

On the other hand, as a general rule the notice or knowledge — as well as the foreseeability — attributable to a dual capacity employer will be greater simply because a vessel owner which hires its own longshore or harbor workers does not in fact n turn over n its vessel to a separate entity. Rather, the dual capacity employer remains in control — at least to some extent (both in time and space) — and often remains in total control of the entire vessel and its appurtenances throughout the relevant time period.

Thus, the fuller range of knowledge and foreseeability normally accompanying constant and total control represents a compelling reason for broader accountability on the part of the dual capacity employer, consistent with general tort principles, *see, e.g., Illinois Constructors Corp. v. Logan Transp., Inc.*, 715 F. Supp. 872, 882 n.22 (N.D. Ill. 1989) (agent's knowledge is imputable to principal, exposing principal to direct liability in tort); *People v. American Medical Ctrs. of Michigan, Ltd.*, 324 N.W.2d 782, 783 (Mich. Ct. App. 1981) (same), *cert. denied*, 464 U.S. 1009 (1983); *Allen v. Prudential Property & Cas. Ins. Co.*, 839 P.2d 798, 806 (Utah 1992) (same).

Even a single capacity employer owner must shoulder the ongoing duty to intervene as necessary to correct hazardous conditions in any part of the vessel remaining within its control, as well as when it acquires actual knowledge of a developing hazard posed by the vessels appurtenances (*e.g.*, an open deck hatch or a leaking powerpack), and knows that the independent stevedore's failure to remedy the hazard is plainly improvident. *See Keller*, 38 F.3d at 32; *cf. also Melanson v. Caribou Reefers, Ltd.*, 667 F.2d 213, 214 (1st Cir. 1981) (noting that *Scindia's* "obviously improvident" standard of care generally pertains only to hazards developing in vessel's *gear*, rather than nonappurtenances like cargo). By the opposite token, however, what can it matter whether a dual capacity employer knows, as it surely does, that its decision *qua* independent stevedore not to eliminate a known hazard is or is not improvident? After all, a vessel can exercise control, and acquire knowledge, *only* through its owner and crew, 33 U.S.C. § 902(21) ("vessel" includes "agents" and "crew members"), and in single capacity cases the

control exercised and the knowledge acquired by these agents normally must be imputed to the vessel.[5] The apology for the dual capacity fiction might be more compelling were there some reality-based indication as to when the markedly different responsibilities incumbent upon dual capacity employers become engaged. But this is simply not the case, of course. Even the determinative one-time a turn over" in a single capacity case, which brings about a clearly distinguishable realignment of responsibilities in keeping with the change in control, bears no relevance in the dual capacity case. In the Jamestown Bridge construction project, for example, the control and use of some vessels, or discrete areas of various vessels, frequently alternated between an employer's vessel-operating employees and its construction employees .[6] Clearly, then, the dual capacity fiction

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5. Indeed, the following language from the House Report severely undercuts the statutory interpretation proposed by the en banc court:

> [N]othing in the [LHWCA] is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.
>
> So, for example, where the longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel *for negligence*. To recover, he must establish that: (1) the vessel put a foreign substance on the deck, *or knew that it was there*, and willfully or negligently failed to remove it; or (2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care under the circumstances.

H.R. Rep. No. 92-1441 (emphasis added).

6. For example, in the companion *en bane* case, the employer, Traylor

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presumes circumstantial settings which overlook the actual facts in many if not most cases.

At best, therefore, the *Castorina* fiction devolves into a metaphysical exercise, at worst into an inducement to dual capacity employers to perpetuate hazardous conditions within their exclusive control. *See Fanetti,* 678 F.2d at 428. Furthermore, it runs directly counter to the clear statement of congressional intent in the LHWCA legislative history; viz., that the "*same principles* [i.e., the *Scindia* duties of care] should apply in determining the liability of the vessel" in both single capacity and dual capacity cases. *See* H.R. Rep. No. 92-1441.

Sixth, the mere fact that the 92d Congress reduced the tort liability exposure of LHWCA employers in certain respects does not permit the extrapolation indulged by the en banc court; viz., Congress must have intended to accord employers the *maximum* protection from negligence liability regardless of any actual differences in their respective levels of knowledge about, or capacities to control, the workplace. In so doing, the en banc

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Brothers, Inc., was required to use the BETTY F and the supply barge, alternately, as a means of transporting the crane, its operating employees and supplies to the designated work sites on Narragansett Bay or as an instrumentality for constructing the coffer dams. Sometimes, in fact, it appears that these discrete operating modes either merged or alternated with such frequency that it could not be ascertained with any confidence, even on the date of the accident, whether the Traylor Brothers' supply barge crew, or its construction team "alter ego," had custody and control of the deck of the supply barge. *Cf. Masinter v. Tenneco Oil Co., Inc.,* 867 F.2d 892 (5th Cir. 1989) (noting that "the present case does not involve a vessel owner 'turning over' the control of a vessel to a stevedore or independent contractor. Rather, [the vessel owner] was contractually bound to conduct the drilling operations and remained in control of the vessel to effectuate this obligation.").

court gives little recognition to the one presumptive principle of statutory interpretation plainly applicable here: the LHWCA "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Reed*, 373 U.S. at 415 (emphasis added). *See Voris v. Eikel*, 346 U.S. 328, 333 (1953); *see also Hogar Aqua y Vida en el Desierto v. Suarez-Medina*, 36 F.3d 177, 181 (1st Cir. 1994) (remedial statutes are to be broadly construed).[7] Consistent with this presumptive interpretation, unless dual capacity employers like A-K demonstrate some legislative purpose behind the LHWCA that is either served by *Castorina* or disserved by *Fanetti*, the benefit of the doubt would belong to the plaintiff-employee.[8]

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7. Generally, this interpretive rule operates to bring injured maritime workers within the workers' compensation scheme in circumstances where § 904 is ambiguous. Insofar as maritime workers are deprived of other common law remedies under § 905(a), a liberal interpretation is not invariably synonymous with one that is "favorable" in fact to maritime workers. In *Reed*, 373 U.S. 410 (1963), and *Jackson*, 386 U.S. 731 (1967), however, the Court made clear that this interpretive rule may be used to expand a covered workers adjunct remedies under the LHWCA, beyond the remedy directly afforded under § 904. The legislative history of the 1972 LHWCA amendments questions *Reed*, but only regarding the continued availability of the "unseaworthiness" remedy against dual capacity employers, *see supra* note 1, leaving undisturbed *Reed's* pro-employee interpretive presumption in the face of other unresolvable statutory ambiguities.

8. I share the common-sense assessment advanced in the concurring opinion, *see supra*, that the dual capacity fiction is unnecessarily cumbersome, but cannot agree that Congress intended, or the *Jones & Laughlin* Court should have held, that all tort suits against dual capacity employers were barred outright. First, the unambiguous second sentence in § 905(b) ("If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." prevented any such interpretation by the Court. By expressly

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Appendix A

III.

Absent controlling precedent or conclusive evidence of congressional intent, we must determine the particular duties of care to be borne by the dual capacity employer. *See Scindia*, 451 U.S. at 165-66, 167 ("Section 905(b) did not specify the acts or omissions of the vessel that would constitute negligence . . . . Much was left to be resolved through the 'application of accepted principles of tort law and the ordinary process of litigation.' ") (quoting H.R.Rep. No.92-1441). Since legal fictions often overlook relevant realities in order to promote some greater systemic benefit, in my view a finding of dual capacity should be the exception, not the presumptive rule.[9]

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restricting the permissible scope of such suits, this language unmistakably implies that there is no such outright bar of negligence suits by employees against their dual capacity employers. *See Jones & Laughlin*, 462 U.S. at 530-31. Second, the concurring opinion suggests that the 92d Congress unintentionally created the present muddle in 1972, then surmises that Congress nonetheless intended the exclusivity provision as a total bar to dual capacity suits. Be that as it may, Congress amended the LHWCA in 1984, one year after the *Jones & Laughlin* decision, and enacted outright bars relating only to particular classes of dual capacity employers (e.g., shipbuilders). *See, e.g., Guilles*, 12 F.3d at 386. Thus, Congress had the opportunity in 1984 to overturn the *Jones & Laughlin* decision in its entirety, yet chose to overrule it only in part. Consequently, a congressional intendment that some dual capacity employers are subject to suit under section 905 seems to me to be settled beyond serious question.

9. *See Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 92 (1934) (("[L]egal fictions have an appropriate place in the administration of the law when they are required by the demands of convenience and justice."); *Pettibone Corp. v. Easley*, 935 F.2d 120, 123 (7th Cir. 1991) ("Even legal fictions have their limits."); *Cruz v. Chesapeake Shipping, Inc.*, 932 F.2d 218, 227-28 (3d Cir. 1991) (noting that maritime law creates legal fictions "for [ ] practical operational reasons"); *United States v. Markgraf*, 736 F.2d

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Neither the Congress nor the *Scindia* Court could have foreseen the recent, fast-paced evolution in maritime construction practices which has exacerbated the instant controversy. Ultimately, therefore, the Congress or the Supreme Court must provide a definitive response to the present conundrum. Until then, however, a the rights of an injured longshoreman . . . should not depend on whether he was employed directly by the vessel or by an independent contractor." *Jones & Laughlin*, 462 U.S. at 531-32.

It is for very good reason that the LHWCA did not invite the courts simply to presume an adequate segregation of the workplace-safety responsibilities incumbent upon maritime employers under the LHWCA, *based merely on some informal or de facto bifurcation of its vessel-owner and construction operations.* Such a presumption would allow, even encourage, dual capacity employer operations to lapse into the types of tacit work arrangements which place employees at unnecessary risk; for example, where few workers, if any, understand which of their dual capacity employer's alter egos is ultimately responsible, through *its* own employees, for monitoring, reporting and/or remedying developing hazards.

At most, therefore, bifurcation should be available as an affirmative defense, as to which the putative dual capacity employer bears the burden of proof. *Scindia* noted that the vessel owner may surrender and entrust a discrete work area to a *single*

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1179, 1187 (7th Cir. 1984) ("[F]or more than 200 years we have been told that the proper office of legal fictions is to prevent, rather than to create, injustices." (citing 3 William Blackstone, *Commentaries on the Laws of England* 43 (1768)), *cert. dismissed*, 469 U.S. 1199 (1985).

capacity employer because the latter presumptively possesses not only the hands-on opportunity to monitor vessel workplace conditions, but also the required expertise in supervising workplace safety. *See Keller*, 38 F.3d at 29-30. On the other hand, since a *dual capacity* employer may or may not actually consign its workplace safety responsibilities to its "construction division," its bifurcation defense should not be allowed if, for instance, the dual capacity employer withheld such responsibilities from its construction division *ab initio*, or delegated them without the clarity and authority reasonably required to enable their reliable discharge. *Cf. id.* at 32 ("a post-'turnover' duty may arise if the vessel owner was obligated, by contract, statute or custom, to monitor stevedoring operations for the purpose of detecting and remedying unsafe conditions"). For example, the slipshod arrangements in place in the companion cases now before the en banc court were of a type that could do nothing to encourage, let alone develop, the expertise necessary to enable a dual capacity employer's "construction division" reliably to discharge its delegated workplace-safety responsibilities along the lines touted in *Scindia*.

Consequently, in my view the first step in establishing the actual bifurcation needed to sustain a dual-capacity employers affirmative defense would be to demonstrate, either through an express delegation of responsibility, or by way of an implied delegation based, for example, on evidence that the dual capacity employers on-site construction division supervisors customarily made workplace safety decisions of a type and magnitude adequate to indicate that reasonably reliable prophylactic measures would be undertaken to prevent workplace mishaps of the sort experienced by the plaintiff-employee.

Secondly, once a dual capacity employer has made the prima

facie showing that primary responsibility for workplace safety had been adequately delegated to its "construction division," n the *Scindia* rationale would contemplate that the injury sustained by the plaintiff-employee have occurred in a workplace area not under the "active control" of the dual capacity employers "vessel division" (or its vessel crew) during any appreciable pre-injury period after the hazardous condition first developed. *See Scindia*, 451 U.S. at 167 (noting that vessel may be liable for its negligent conduct "in areas . . . under the active control of the vessel during the stevedoring operations"); *Fanetti*, 678 F.2d at 429 (noting that the 1972 LHWCA amendments "neither expressly nor implicitly purport[ ] to overrule or modify the traditional rule that the longshoreman may recover the total amount of his damages from the vessel if the latter's negligence is a contributing cause of his injury, even if the stevedore, whose limited liability is fixed by statute, is partly to blame") (quoting *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 264 (1979)).

The rationale for such a requirement seems unimpeachable: an employer may not use the dual capacity fiction to circumvent LHWCA tort liability by artificially compartmentalizing its *actual knowledge*. *Id.* at 430 ("[R]equiring trial judges to give juries instructions about the shipowner's right to rely upon an expert contractor who, in fact, was not there . . . is schizophrenic and the predictable effect upon the jury one of bafflement."). Since dual capacity employers that utilize vessels to perform their maritime construction activities may never engage in a one-time turnover of any discrete area of the vessel (as would the single capacity vessel owner in the more traditional stevedoring context), a rational factfinder reasonably could conclude that the area within which the hazardous condition developed had been jointly or interchangeably used by the dual capacity employer's vessel division and its construction division

employees to such an extent that the dual capacity employer had never surrendered "active control" of the injury site to its construction "division." Thus, were there to be a remand in this case, the record might enable a reasonable finding that agents of A-K's "construction division" exclusively and continuously controlled the barge from the time the hazardous condition first developed until a few days later when Morehead fell into the open hatch.

Once a dual capacity employer satisfies the two aforementioned components in its burden of proof, tort liability could not be imposed absent showings by the plaintiff-employee that the employer had acquired (i) actual knowledge of the developing hazard in an area no longer within the employer's "active control" and (ii) notice that the failure of its construction division to remedy the hazard was "obviously improvident." *Scindia,* 451 U.S. at 174-75. Thus, the dual capacity employer would remain responsible for monitoring all areas of the vessel for developing hazards, even though it is allowed to rely upon its construction division, in the first instance, to remedy hazards within areas under the "active control" of its construction division.

Actual knowledge of a developing hazard normally would be imputed to a corporate dual capacity employer if its agents or employees acquired actual knowledge of the developing hazard. Under the "obviously improvident" standard, liability also could be imputed to the dual capacity employer based on extrinsic evidence as to the obviousness of the developing hazard and the length of time it remained unremedied.

Although the "obviously improvident" standard imported from *Scindia* entails a lesser duty of care than the "reasonable care" required for actionable negligence, it nonetheless serves

to diminish the grave risk that virtually any perfunctory designation of employees as "vessel-owner" workers may allow a dual capacity employer to shield itself from all tort liability. Thus, on remand the record in the present case might enable a finding that the decision not to close the open hatch for a few days was not "obviously improvident" even assuming responsibility for the decision were to be imputed to A-K. *Cf. Scindia*, 451 U.S. at 175, 178-79 (noting genuine factual dispute whether vessel owner was liable because it knew that stevedore's decision not to fix defective winch for two days had been obviously improvident, and remanding for further factual findings). In both cases before the *en banc* court, however, the district court decisions were made in reliance on the *Castorina* standard for defining the duties of care incumbent upon dual capacity employers. Since the ultimate findings — as to whether breaches of the applicable duty of care occurred — necessarily were dependent upon how those duties were defined, I would remand the A-K case for further proceedings and/or specific factual findings on the defendant employer's affirmative defense of bifurcation.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS, FOR THE FIRST CIRCUIT DATED FEBRUARY 6, 1996 IN *MOREHEAD V. ATKINSON-KIEWIT, J/V, ET AL.*

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1581

MARK MOREHEAD,

Plaintiff, Appellant,

v.

ATKINSON-KIEWIT, J/V, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Bailey Aldrich,* *Senior Circuit Judge*]

Before

Boudin, *Circuit Judge,*

Campbell, *Senior Circuit Judge,*

and Stahl, *Circuit Judge.*

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* Of the First Circuit, sitting by designation.

Appendix B

Thomas M. Bond, with whom *David B. Kaplan* and *The Kaplan/ Bond Group* were on brief for appellant.

Kathleen B. Carr, with whom *Thomas E. Clinton, Robert E. Collins* and *Clinton & Muzvka, P.C.* were on brief for appellees.

February 6, 1996

CAMPBELL, *Senior Circuit Judge.* Plaintiff Mark Morehead, a harbor worker injured while working on a construction barge, appeals from a judgment dismissing his negligence action against Atkinson-Kiewit, J/V ("A-K"), a firm that was both his employer and charterer of the barge. Morehead brought this action under section 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, authorizing covered employees to sue a vessel as a third party for injury caused by the negligence of the vessel. In its capacity as Morehead's employer, A-K is immune from tort actions brought by covered employees like Morehead. But as the bare boat charterer of the barge on which Morehead was injured, A-K is deemed also to be the statutory vessel owner; and it was in this capacity that A-K was sued.

The case raises difficult questions of first impression in this circuit as to the liability of a so-called dual capacity employer under the LHWCA. In particular, we must decide how to assess whether A-K's alleged negligence occurred in its vessel capacity (allowing suit to be brought under section 905(b)) or in its employer capacity (immunizing it from suit). While the Supreme Court has endorsed the bringing of section 905(b) negligence actions against a dual capacity defendant in its vessel owner capacity, the Court has yet to define, in such a case, the point at which employer responsibility ends and vessel responsibility

begins. Nor has the Court decided to what extent principles laid down in stevedore cases involving a separately owned vessel apply to claims by non-stevedore harbor workers.

I. Background

Mark Morehead was employed by A-K, a joint venture formed between Guy Atkinson Co. and Kiewit Eastern to complete the construction of the Jamestown Bridge spanning Narragansett Bay in Rhode Island. In order to transport materials and equipment around the bay to the work sites, A-K bare boat chartered several barges. The barges involved in this case, the CHER 106 and the HUGHES 707, were flat deck barges — floating platforms bare of structures or equipment. A-K also leased two tugs from Woods Hole Towing Co. to transport the barges where needed. The tugs themselves were crewed by Woods Hole employees.[1]

A-K hired carpenters from a local union to build the bridge. Their responsibilities included cutting timbers and steel and setting up concrete forms for pours. As union requirements prevented the tug captain or crew from handling the lines on the barges, some carpenters also tended the lines on the barges as "scowmen." Morehead's regular duties included both carpentry and linehandling.

On January 29, 1990, Morehead and another carpenter/scowman, Steven Breault, were untying the HUGHES 707 from the CHER 106. A barge was to be surveyed in connection with

1. Although Woods Hole was originally named as a defendant in this action, the district court granted its motion for summary judgment against Morehead, who has not appealed from that decision. Consequently, Woods Hole is no longer a party.

her going off hire. A tug stood nearby. The barges were not at this time carrying materials or equipment, but rather were set off on the north side of the Davisville Pier. Breault threw a heavy line to Morehead, who, in attempting to catch it, stepped backwards into an open hatch which was flush with the deck on one of the barges. The district court noted conflicting testimony as to which barge Morehead was on when injured,[2] but concluded that in any event, the single open hatch was insufficiently obvious. Breault testified that he had opened the hatch on the HUGHES (which he named as the barge to be surveyed) a few days before the accident, because A-K was preparing for an off-hire survey before returning the barge to the owner. Breault testified that a supervisor carpenter had told him to open the hatch.

Morehead filed a complaint against A-K and Woods Hole on April 22, 1991, alleging Jones Act negligence, unseaworthiness, maintenance, and cure, and negligence under section 905(b) of the LHWCA. Following the denial of A-K's motion for summary judgment, Morehead voluntarily withdrew all claims except his claim for negligence under the LHWCA. A bench trial commenced on April 11, 1994. On April 29, 1994, the district court issued its Findings and Order dismissing Morehead's complaint and A-K's cross-claim against Woods Hole. It wrote:

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2. The district court did not definitively find which barge Morehead was on at the time of the accident. The court found "more likely" that Morehead was on the HUGHES 707 and Breault was on the CHER 106, but wrote: "In either event, however, the court would find a single open hatch . . . insufficiently obvious. There would seem a presumption that an unmarked 18 inch opening on an otherwise solid deck is a failure of a reasonably safe proffer to one expected to walk thereon. The court would therefore find the barge, whichever one it was, unseaworthy, but under the statute (33 U.S.C. § 905(b)) this is irrelevant."

> [T]he court does not find it negligence of [appellee] viewed in its capacity as pro hac vice owner. Rather, it appears to be a temporary condition created by it solely in its capacity as charterer. . . . These two capacities are legally separate, even though they be the same individual.

This passage confusingly distinguishes between an owner pro hac vice and a bare boat charterer (the statute includes both in its definition of "vessel," *see* 33 U.S.C. § 902(21)). The parties agree that the district court actually meant to distinguish between the appellee as vessel and as employer. We also interpret the district court's order in that fashion.

Judgment was entered on May 4, 1994 in A-K's favor. This appeal followed.

II. Standard of Review

A district court's fact-based findings relative to negligence are reviewable only for clear error. *See, e.g., Levene v. Pintail Enters.*, 943 F.2d 528, 535-36 (5th Cir. 1991), *cert. denied*, 504 U.S. 940 (1992). However, the question of whether the district court applied the proper standard of care is one of law, subject to *de novo* appellate review. *See, e.g., Keller v. United States*, 38 F.3d 16, 22-23 (1st Cir. 1994); *Elberg v. Mobil Oil Corp.*, 967 F.2d 1146, 1149 (7th Cir. 1992).

The lower court did not explain the criteria it applied in deciding what duties of care to attribute, respectively, to A-K in its separate capacities as LHWCA employer and as owner (charterer) of the barge. Rather, it simply cited along with its

conclusions existing precedent relative to section 905(b) liability, *e.g., Scindia Steam Navigation Co. v. De los Santos,* 451 U.S. 156 (1981), and *Castorina v. Lykes Bros. S.S.,* 758 F.2d 1025 (5th Cir.), *cert. denied,* 474 U.S. 846 (1985). The factual circumstances of these and related cases, however, are too removed from those here to reveal the precise standards and analysis that were applied in this case. Nor does the language of the LHWCA provide clear guidance. We can only hope that the Supreme Court will eventually elucidate the standards applicable to dual status employers of harbor workers in circumstances comparable to these. Until then, we do our best to outline the legal principles that we believe, govern the facts presented here. Under those principles — and giving due deference to the district court's authority as fact finder — we affirm the judgment below.

III. "Vessel" Status

We dispose first of a less troublesome issue. The district court provisionally assumed that the barge on which Morehead was injured was a "vessel" within the LHWCA, although it found no need to decide the matter. Section 905(b) permits an LHWCA employee to sue in negligence only "[i]n the event of injury . . . caused by the negligence of a vessel." Section 902(21) of the LHWCA defines "vessel" to include a bare boat charterer among the parties that may be held liable under section 905(b). A-K has not contested its status as bare boat charterer. Nor has it asserted on appeal any reason to conclude that the HUGHES and CHER were not among the structures included as "vessels" under the LHWCA. *See, e.g., Kathriner v. Unisea, Inc.,* 975 F.2d 657, 662 (9th Cir. 1992) (to determine whether a structure is a "vessel" under the LHWCA, most courts have applied the general definition in 1 U.S.C. § 3 of a "watercraft or other artificial contrivance used, or capable of being used, as a means

of transportation on water"); *accord DiGiovanni v. Traylor Bros.*, 830 F. Supp. 106, 108-109 (D.R.I. 1993). The LHWCA definition of "vessel" is more inclusive than that used for evaluating seaman status under the Jones Act.[3] For present purposes, we shall assume without deciding that both barges were vessels under the LHWCA, for the negligence of which a section 905(b) claim may be brought.

IV. Statutory Framework

The LHWCA establishes a comprehensive federal worker's compensation scheme which holds employers liable, irrespective of fault, for securing the payment of compensation to qualified maritime employees injured in the course of their employment. 33 U.S.C. § 904.[4] This liability of employers is termed "exclusive." *Id.* § 905(a).

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3. *See Generally Chandris, Inc. v. Latsis*, 115 S. Ct. 2172, 2192 (1995) (to qualify as a seaman under the Jones Act, "a maritime employee must have a substantial employment-related connection to a vessel *in navigation*"); *Kathriner*, 975 F.2d at 659-663 (applying tests of "vessel" under Jones Act and LHWCA). Plaintiff withdrew his maritime claims, including the claim of Jones Act negligence.

4. Section 904 provides in relevant part: "(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title . . . . (b) Compensation shall be payable irrespective of fault as a cause for the injury." 33 U.S.C. § 904.

A statutorily covered employee is "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker," except "a master or member of a crew of any vessel" and other limited categories of workers. *Id.* § 902(3).

Appendix B

Section 905(b) of the Act authorizes certain covered employees to sue the vessel as a third party if their employment injury was caused by the negligence of the vessel.[5] But

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5. Section 905(b) provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. § 905(b).

employees may no longer sue the vessel on a strict liability theory for her "unseaworthiness,"[6] Congress having eliminated the latter as a remedy for longshore and harbor workers in the 1972 Amendments to the LHWCA. The 1972 Amendments require employees to show fault of the vessel, bar a vessel's attempt to obtain indemnification from the employer, and otherwise have increased the worker's compensation recoverable from an employer. *See Addison v. Bulk Food Carriers, Inc.*, 489 F.2d 1041, 1042 (1st Cir. 1974). Focusing on longshore workers who, to date, have been the occupational group chiefly discussed in Supreme Court cases under the LHWCA, the Court described these changes as designed "to shift more of the responsibility for compensating injured longshoremen to the party best able to prevent injuries: the stevedore-employer." *Howlett v. Birkdale Shipping Co.*, 114 S. Ct. 2057, 2063 (1994); *see also Keller*, 38 F.3d at 23.

In 1984 Amendments to the LHWCA, Congress further narrowed the availability of negligence actions by certain categories of harbor workers against a vessel in circumstances where the employer was also the owner of the offending vessel. In these so-called "dual capacity" cases, Congress barred employees providing "shipbuilding, repairing, or breaking services" from suing the employer-vessel owner for negligence in *any* capacity. 33 U.S.C. § 905(b). The Amendments did not purport to prohibit LHWCA employees other than in the described categories from suing for negligence in dual capacity

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6. *See* 33 U.S.C. § 905(b). Unseaworthiness is a maritime remedy that was established "simply by showing that some condition or appurtenance on board the vessel at the time of the accident was unreasonably hazardous, even if the stevedore-employer was the sole cause of the hazard." *Keller*, 38 F.3d at 23 (citing *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94 (1946)).

cases. *See* H.R. Rep. No. 98-570(I), 98th Cong., 2d Sess *reprinted in* 1984 U.S.C.C.A.N. 2734, 2741 (hereafter 1984 U.S.C.C.A.N.) ("The Committee intends that this language [in § 905(b)] not be construed to limit an employees right to bring a cause of action, except in the circumstances indicated within the language."); *cf. Guilles v. Sea-Land Serv., Inc.*, 12 F.3d 381, 386 (2d Cir. 1993) (affirming relief cook's judgment against negligent employer-vessel owner and explaining that "[t]he 1984 change . . . shows that Congress knew how to preclude a class of employees from being able to sue an employer-vessel if it chose to do so"); *Gay v. Barge 226*, 915 F.2d 1007, 1010 (5th Cir. 1990) ("[T]he § 905(b) bar is specific to the occupations listed: shipbuilders, ship repairers and ship breakers.").

The Supreme Court had previously interpreted section 905(b) to permit covered employees to bring third-party negligence actions against their employer qua vessel owner. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 530-32 (1983) (explaining that if Congress had intended to exempt employer-vessel owners from negligence suits, then the sentence in section 905(b) barring recovery from them where fellow longshore workers caused the injury would have been unnecessary). As Morehead's occupational category does not fall within any of those Congress expressly excepted in the 1984 Amendments, *supra, Jones & Laughlin* would appear to allow Morehead to bring a third-party negligence action against A-K in its vessel capacity.[7] To prevail, Morehead has to show that

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7. The parties have not disputed on appeal that Morehead is a statutorily covered employee of a statutorily covered employer. As a harbor worker with carpentry and linehandling duties, Morehead meets the statutory definition of a covered employee under section 902(3) and does not fall within any of the categories of workers expressly prohibited from suing under section 905(b).

any negligence on A-K's part is attributable to it as vessel rather than as Morehead's insured LHWCA employer.

V. Defining the Vessel's Duty of Care: The Supreme Court Cases

As *Jones & Laughlin* allows Morehead to bring a third-party action against the vessel owner that is simultaneously his employer, we are left to ascertain the contours of the duty of care owed to Morehead by A-K in its distinct capacity as vessel. Such a definition is needed in order to decide whether the alleged negligence — the open hatch and failure to warn — is attributable to A-K qua vessel owner rather than qua employer. Congress left to the courts the task of defining the applicable duty of care. *See Howlett,* 114 S. Ct. at 2063 ("Because Congress did not 'specify the acts or omissions of the vessel that would constitute negligence,' the contours of a vessel's duty to longshore workers are 'left to be resolved through the "application of accepted principles of tort law and the ordinary process of litigation." ' ") (citing *Scindia,* 451 U.S. at 165-66).

In *Scindia Steam Navigation Co. v. De los Santos,* 451 U.S. 156 (1981), the Supreme Court considered the duty of care that a vessel owner owed to an injured longshore worker who was employed by an independent stevedoring firm. For this common triangular relationship at least — vessel, stevedore, and longshore worker[8] — the Court held that limiting the vessel's

8. In *Howlett,* the Court suggested that this relationship was the typical one in the longshoring business. *See Howlett,* 114 S. Ct. at 2062 ("The injured longshoreman's employer — in most instances, an independent stevedore, *see Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256 (1979) — must pay the statutory benefits regardless of fault, but is shielded from any further liability to the longshoreman.") (citations omitted).

duty of care so as to put the chief responsibility upon the independent stevedore was consistent with Congress' intent to permit third-party negligence actions against the vessel but to eliminate the vessel's no-fault liability (the "unseaworthiness" claim). In *Howlett,* a case that also involved a longshore worker suing an independent vessel, the Court restated the vessel's limited residual duties:

> The first, which courts have come to call the "*turnover duty*," relates to the condition of the ship upon the commencement of stevedoring operations. . . . The second duty, applicable once stevedoring operations have begun, provides that a shipowner must exercise reasonable care to prevent injuries to longshoremen in areas that remain under the "*active control of the vessel.*". . . The third, duty, called the "*duty to intervene,*" concerns the vessel's obligations with regard to cargo operations in areas under the principal control of the independent stevedore.

Howlett, 114 S. Ct. at 2063 (citations omitted) (emphasis added).

This court recently applied these duties in *Keller v. United States,* 38 F.3d 16 (1st Cir. 1994), a case also involving the triangular relationship of vessel, stevedore, and longshore worker. We described two duties of a vessel prior to "turnover": the "duty to warn" and the "duty of safe condition." *Id.* at 23-24. We further described three "continuing" duties of care:

> First, the vessel owner might remain under such a duty were it to retain actual

> physical control or custody of a portion of the vessel, or participate in stevedoring operations. *Scindia,* 451 U.S. at 167, 101 S. Ct. at 1622 . . . . Second, a duty to intervene might attach in the event the vessel owner were to acquire *actual knowledge* that "unsafe conditions" had *developed* in the vessel's appurtenances since turnover, that the stevedore-employer will not address the unsafe condition, *and* that the stevedore's decision not to remedy the developing hazard was "obviously improvident" in the circumstances. *Id.,* at 174-75, 101 S. Ct. at 1625-26. Third, even absent actual control, participation or knowledge, a post-"turnover" duty may arise if the vessel owner was obligated, by contract, statute or custom, to monitor stevedoring operations for the purpose of detecting and remedying unsafe conditions. *Id.* at 172, 101 S. Ct. at 1624-25.

Id. at 32.

Keller affirmed a judgment that an independent vessel owner had breached neither its turnover nor its continuing duties to a longshore worker who had fallen from a ladder on board the vessel. We ruled that the district court had not erred in relying on testimony based on industry standards, which indicated fulfillment of the turnover duty. We also found no breach of a continuing duty of the vessel, where the allegedly dangerous condition developed during cable loading operations which were under the stevedore's control.

As did the Supreme Court in *Scindia*, this court noted the independent stevedore's greater skill and expertise relative to the vessel's, making the former better positioned than the vessel to prevent employee injury, and the traditional stevedoring warranty to perform competently. *See id.* at 29-30; *see also Howlett*, 114 S. Ct. at 2065 ("The rule relieving vessels from this general duty [to exercise reasonable care to discover dangerous conditions that develop] rests upon 'the justifiable expectations of the vessel that the stevedore would perform with reasonable competence and see to the safety of the cargo operations.' ") (citation omitted); *Scindia*, 451 U.S. at 172 ("[the 1972 Amendments] did not undermine the justifiable expectations of the vessel that the stevedore would perform with reasonable competence and see to the safety of the cargo operations"). Further supporting the vessel owner's justifiable reliance on the stevedore is that the latter is "subject to detailed legislative and administrative prescriptions for affording its workers a 'safe' workplace." *Keller*, 38 F.3d at 24 (citing 33 U.S.C. § 941 and accompanying regulations, 29 C.F.R. §§ 1918.1-1918.106, § 1918.25, and *Scindia*, 451 U.S. at 170).

In *Scindia* and *Howlett* the Supreme Court outlined a vessel owner's duties of care relative to a longshore worker employed by an independent stevedore.[9] But the Supreme Court has not yet had occasion to analyze the vessel's duties in a dual capacity case.[10] Nor has the Court considered to what degree its *Scindia*

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9. Other courts have applied *Scindia* duties to LHWCA-covered employees other than longshore workers in the familiar tripartite context. *See, e.g., Elders*, 967 F.2d at 1149-1150 (welder); *Teply v. Mobil Oil Corp.*, 859 F.2d 375, 377 (5th Cir. 1988) (worker at barge-accessible oil well).

10. In *Jones & Laughlin*, the negligence of the dual capacity defendant qua vessel had been conceded.

analysis applies to non-longshoring harbor workers, whose duties and modus operandi often differ considerably from those of longshore workers.[11] The Court has said, though, that "[o]f course, [section 905(b)] does make it clear that a vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its 'stevedore' [the insured employer] capacity." *Jones & Laughlin*, 462 U.S. at 531 n.6.

How to distinguish between vessel owner negligence and employer negligence — where the same entity is both vessel owner and employer — is key here, because Morehead's statutory right to sue is solely for injury caused by vessel negligence. For work injuries resulting from employer negligence, Morehead must accept the worker's compensation prescribed under the LHWCA.

A further matter complicates this case: as the defendant has two capacities, so too, it might be said, does the plaintiff. Morehead was a carpenter, but was hired to perform both carpentry and scowmen's duties. A-K did not employ a separate

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11. Longshore workers such as those in *Scindia* typically load and unload cargo ships that are operated full-time by a master and crew. Vessel negligence can often be distinguished from stevedore negligence by determining to what extent the dangerous condition was caused, or allowed to persist, by reason of the neglect of the vessel's crew rather than of the stevedoring employees. Harbor workers, however, may work (as here) on construction barges that are moved about by tugs and have no crew as such. As part of their employment, they may do whatever is needed to tend lines and service the barges, besides performing normal construction duties as carpenters, electricians, or the like. Thus, assessing what responsibilities fall within the purview of the *vessel's* duty of care, as distinguished from the employer's, can be an elusive quest.

crew on its barges.[12] As we will discuss further below, this "*double* dual capacity" aspect of the case is a factor to be considered in determining whether negligent acts are properly attributable to a defendant as vessel.[13]

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12. As noted, the tugs that towed the barges were captained and crewed by employes of Woods Hole, which supplied the tugs. These employees did not handle the lines on the barges; under union rules, only carpenters/scowmen employed by A-K (such as Morehead) did.

13. This mix of responsibilities might, in other cases, expand the range of possible remedies available to an injured employee, who must then choose between the mutually exclusive regimes of the LHWCA and Jones Act. *See Chandris*, 115 S. Ct. at 2183-2184 (citing *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347 (1991)). In *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991), the Supreme Court held that a shipyard rigging foreman — who handled lines connecting floating platforms to vessels under repair — was not precluded as a matter of law from seeking a tort remedy under the Jones Act merely because ship repairers are among those jobs specifically enumerated under the LHWCA. *See id.* at 89 ("By its terms the LHWCA preserves the Jones Act remedy for vessel crewmen, even if they are employed by a shipyard. A maritime worker is limited to LHWCA remedies only if no genuine issue of fact exists as to whether the worker was a seaman under the Jones Act.").

Morehead withdrew his Jones Act claim, presumably because he did not believe he could establish Jones Act seaman status. Nonetheless, Morehead has attempted to focus our attention on the vessel-like responsibilities that Breault performed in the period before the injury, as discussed *infra*. While an emphasis on vessel-type duties may be appropriate for the fact-specific inquiry into seaman status, we place little weight on this attempt to bifurcate vessel and construction activities when these workers were hired to perform both. The definition of a covered employee under the LHWCA excludes "a master or member of a crew of any vessel." 33 U.S.C. § 902(3). It seems inconsistent with this exclusion for Morehead to buttress his claim under the LHWCA with arguments portraying a fellow employee, Breault, as if he were a member of the crew of the vessel. *See infra*.

Appendix B

VI. Lower Court Precedent

While the Supreme Court has said little about dual capacity cases beyond allowing such defendants to be sued in their vessel owner capacity, some circuits have decided cases similar to ours. They have asked whether the alleged negligence was due to the defendant qua employer or qua vessel, with recovery allowed only in the latter instance. And, principles borrowed from *Scindia* have been applied to harbor workers as well as longshore workers.

Applying *Scindia* to a dual capacity defendant raises questions even in the longshoring context. For example, if a defendant is aware of a defect in the work area as stevedore employer, should such awareness also be attributed to it as vessel owner? And as we note *supra, Scindia* and *Keller* emphasized a vessel owner's reliance upon the presumed expertise of the stevedore, an independent contractor. Where the vessel owner is also the stevedore, is it reasonable to attribute such reliance?

Concerns of this nature led the Second Circuit in *Fanetti v. Hellenic Lines Ltd.*, 678 F.2d 424 (2d Cir. 1982), *cert. denied*, 463 U.S. 1206 (1983), to indicate that a longshore worker's claim against a dual capacity defendant would be analyzed differently from a claim against a separate shipowner brought by the employee of an independent stevedore. In *Fanetti*, a longshore worker was injured on deck by an unsafe condition. The dual capacity defendant argued that 1) in its role as employer-stevedore, it was primarily responsible for the safety of the workplace, and 2) as vessel owner, it should be able to rely upon its expertise as stevedore, thereby avoiding liability as vessel for the negligence.

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The Second Circuit rejected the defendant's attempt to escape liability in negligence as vessel by seizing its "employer hat." Relying on a dissent by Judge Friendly in *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682, 687 (2d Cir.) (Friendly, J., dissenting), *cert. denied*, 439 U.S. 929 (1978), the court of appeals ruled that a vessel assumes a *greater* duty of care when there is no *independent* employer responsible for workplace conditions, upon whom the vessel owner may rely to oversee the safety of the workplace on board. *See Fanetti*, 678 F.2d at 428 (citing *Canizzo*, 579 F.2d at 689-690).

Rearranging duties of care as in *Fanetti* raises serious problems, discussed hereafter, by enlarging an employer's tort liability beyond the purposes of the 1972 Amendments. *Cf. Howlett*, 114 S. Ct. at 2063. *Fanetti*, moreover, was decided before *Jones & Laughlin* was handed down in the Supreme Court. We doubt that the Second Circuit today would endorse *Fanetti's* broadened duty of care, given the Supreme Court's remark "that a vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its 'stevedore' capacity." *Jones & Laughlin*, 462 U.S. at 531 n.6. This comment suggests that the Court expected the limited vessel liability in *Scindia* to carry over to dual capacity situations as well. We are not aware of any later case in which the Second Circuit or any other circuit has followed *Fanetti's* purported enlargement of a vessel's duty in a dual capacity situation.[14] *Cf.*

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14. *Fanetti* might have reached the same result of vessel liability without applying a broader duty of care. The defendant did not dispute that the vessel's crew created the hazard while performing work unrelated to longshoring operations. *See Fanetti*, 678 F.2d at 426. In this situation, the defendant qua vessel arguably had active control over the crew and knew or should have known about the injury-causing actions, making it liable even under the *Scindia* standards.

Guilles, 12 F.3d at 383, 387 (ruling only that a valid cause of action under section 905(b) existed, where the parties had stipulated to the vessel's negligence). Whether called dicta or something else, we cannot comfortably ignore the Court's statement in *Jones & Laughlin*.

Contrary to *Fanetti*, the Fifth Circuit, which has decided a great number of LHWCA cases, has allocated the same vessel duties of care to dual and single capacity defendants. It regards this approach as in keeping with the Supreme Court's limiting of a vessel's duty of care (*e.g.*, *Scindia* and *Jones & Laughlin*), and with Congress' intent to provide injured workers the same remedies, regardless of whether their employer or another happens to be the legal owner of the vessel.[15]

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15. Other courts have followed suit. *See, e.g., Halpin v. Atkinson-Kiewit, J.V.*, 894 F. Supp. 486 (D. Mass. 1995) (applying *Scindia* duties and denying defendant's motion for partial judgment on the pleadings); *DiGiovanni v. Traylor Bros.*, 855 F. Supp. 37 (D.R.I. 1994), *appeal docketed*, No. 94-1775 (finding no violation of *Scindia* duties where hazard was obvious following "turnover" of the vessel, defendant as vessel lacked "active control" over or knowledge of leak from equipment placed aboard for employment operations, and the circumstances did not give rise to a duty to intervene); *Koernschild v. W.H. Streit, Inc.*, 834 F. Supp. 711 (D.N.J. 1993) (applying *Scindia* duties and denying summary judgment to the defendant where factual dispute existed concerning the plaintiff's awareness of the hazard); *Coats v. Luedtke Eng'g Co.*, 744 F. Supp. 884 (E.D. Wisc. 1990) (deeming "employer" responsible for providing employee a safe passageway to his job on the vessel, and granting summary judgment to the defendant given its lack of "active control" as vessel over a condition off-board the vessel).

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The seminal Fifth Circuit case was *Castorina v. Lykes Bros. S.S.*, 758 F.2d 1025 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985). There, a longshore worker exposed to asbestos during cargo operations alleged that his employer-vessel owner knew of the harm qua vessel and failed to make the vessel safe. The Fifth Circuit stated that the LHWCA compensation scheme "requires us to separate the negligence of the shipowner and that of the stevedore, even when the shipowner performs its own stevedoring activities." *Id.* at 1033. Noting that the alleged harm had arisen during stevedoring activities, the court refused to impute any knowledge of this danger by the employer to it as vessel. It explained:

> To impute this knowledge to a shipowner-employer would be to hold it liable in tort for damages arising from its negligence as stevedore, and effectively to eliminate the exclusivity provisions of sections 905(a) & (b). This result is contrary to the language and purpose of the Act as amended. We therefore hold that the duty owed by a shipowner to a longshoreman under section 905(b) is that established by *Scindia* and its progeny; this duty is neither heightened nor diminished when the longshoreman is employed directly by the vessel.

Id.; accord Tran v. Manitowoc Eng'g Co., 767 F.2d 223, 228 (5th Cir. 1985).

On the facts of *Castorina*, it was relatively simple to apply the *Scindia* duty of care arising from knowledge of an unsafe condition. In a more recent case, the Fifth Circuit considered a

situation slightly more analogous to the present. In *Levene v. Pintail Enters.*, 943 F.2d 528 (5th Cir. 1991), *cert. denied*, 504 U.S. 940 (1992), the injured employee was a heavy equipment operator who performed other maritime tasks as well. A captain had instructed Levene to untie another owner's barge, which blocked access to the particular barge they had been instructed to pick up. Levene was injured on the other owners barge, where grease and scrap materials were present on the deck. *See id.* at 530.

Applying the *Scindia* duty of turnover and the duty arising from active control over a dangerous condition, the *Levene* court rejected the employee's claim. The court explained that *Scindia* did not mandate "extending the duty of a shipowner to protection against hazards on another ship." *Id.* at 534. "[W]e decline to fashion a general standard of 'reasonable care' that would require a shipowner to protect against any and all hazards a longshoreman might encounter in the course of his work." *Id.* Further, the court did not view "the fleeing contact between Pintail [the employer-vessel owner] and the BB-242 [the separate owner's barge] as the kind of control that could result in a finding of liability." *Id.* at 535. It noted that the duty arising from active control over a hazardous condition may be triggered when the dangerous condition is on the vessel itself. *See id.* (discussing *Masinter v. Tenneco Oil Co.*, 867 F.2d 892, 896-897 (5th Cir. 1989), a non-dual capacity case in which the vessel crew was solely responsible for placing a stairway in a way that caused injury to a worker, and the vessel was "*contractually bound* to conduct the drilling operations and remained in control of the vessel to effectuate this obligation") Even though the captain "temporarily was in 'command' " of both the vessel and the separate owners barge, the court found that this did not rise to the level of active control required. *Id.*

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VII. Resolving This Case

We agree with the Fifth Circuit, for similar reasons, that the duties of care described in *Scindia* should be applied in dual capacity cases insofar as the facts allow. To do so, a court may have to divide the single defendant into a hypothetical independent employer and independent vessel owner, each separately holding the duties allocated under principles suggested in *Scindia*. A court may sometimes be assisted in this process by the defendant's internal employment arrangements assigning certain personnel to the "vessel" side of its operation. On occasion, however, the duties and work arrangements pertaining to a suing harbor worker may be so foreign to those in *Scindia's* stevedoring context that *Scindia's* analysis will become no more than a point of departure. Nonetheless, *Scindia's* general approach, at least, can be followed and, in many cases, some or all of its express analysis may be useable.

The statutory language and the legislative history of the 1972 and 1984 Amendments plainly evidence Congress' intent that the workers compensation scheme be the primary remedy for all covered workers, regardless of an employer's commercial practice in regard to vessel ownership. *See* 33 U.S.C. § 905(a) (exclusiveness of employer's liability); 1984 U.S.C.C.A.N. at 2740 ("In the Committee's view, the Longshore Act should be the *primary* source of compensation for covered workers who are disabled or who may die as a result of a job-related injury or disease.") (emphasis supplied); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 4698, 4705 ("[T]he bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services .... The

Committee's intent is that the *same principles* should apply in determining liability of the vessel which employs its own longshoremen . . . as apply when an independent contractor employs such persons.") (emphasis supplied). The 1972 Amendments carefully balanced the concerns of employers, vessels, and covered workers. We are not disposed to upset that balance by expanding the liability of employers that act simultaneously as vessel owners, when the statute does not call for such a reading and the Supreme Court has cautioned against it.

As already observed, *Scindia* will sometimes afford less direct guidance on those duties owed to harbor workers than it does on those owed to longshore workers. Courts will need to decide, on a case-specific basis, whether the harbor worker's employment arrangement sufficiently resembles that in *Scindia* to make particular specifics germane.

Here, the employment arrangement is sufficiently analogous to make *Scindia* a useful guide. The *Scindia* Court reasoned that once longshore workers came aboard and began carrying out their cargo duties under a stevedore's supervision, the vessel itself had no general duty to exercise reasonable care to inspect for unsafe workplace conditions; rather, it could rely on the longshore worker's employer to do so. *See Scindia*, 451 U.S. at 172. Here, A-K hired harbor workers through the local carpenters union and, as their employer, supervised them as they tended the barges, handling the lines and carrying out construction activities thereon. Both types of activities — construction and scowmen's work — were assigned to them and were performed for A-K qua employer. Workers like Morehead received their daily instructions from A-K's carpenter-foremen, while A-K's project safety manager met periodically with them to discuss

site-specific safety issues. Therefore, *Scindia's* principle of limited liability of the vessel sensibly and logically applies, because the employees effectively assumed control of the barges working under A-K in its capacity as their employer rather than under A-K as the charterer (hence owner) of the barge. A-K qua shipowner had no separate captain and crew assigned to the barge. The allegedly negligent conditions (the open hatch and the absence of warnings) were not attributable to the errors of separate maritime agents acting specifically for the vessel. Rather the alleged acts of negligence were those of fellow harbor workers acting for the employer. *Cf.* 33 U.S.C. § 905(b) (prohibiting liability of an employer-vessel owner for acts "caused by the negligence of persons engaged in providing stevedoring services to the vessel").

Morehead does not assert any breach of the *Scindia* "turnover" duty (*e.g.*, that A-K, as vessel owner, turned over the barge to the harbor workers knowing or with the duty to have known, of some defect in the barge that later caused injury). He argues only that A-K as vessel violated duties it owed him because, at the time he was injured, A-K as vessel (rather than A-K as employer) allegedly had "active control" over or "actual knowledge" of the open hatch. *Cf. Howlett,* 114 S. Ct. at 2063 (noting appellant confined arguments to breach of turnover duty to warn); *Elberg,* 967 F.2d at 1150 (noting appellant confined arguments to breach of duty to intervene). Equating employment for worker's compensation purposes solely with construction activity, he asserts that no construction purpose, hence no employment purpose, was being pursued at the time of his injury. He draws support from the district court's findings that the barges were set alongside the pier and were not carrying construction equipment. Morehead emphasizes that A-K instructed Breault to open the hatch to air it out so that A-K could exercise what

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Morehead argues was a vessel function — having a marine surveyor examine the barge before returning it to the owner. He further claims that A-K's safety manager or other carpenter foremen knew or should have known that the open hatch was a potentially hazardous condition. Resting on purported agency principles, Morehead asks us to assign these employees, acts to A-K in its vessel capacity, on the theory that A-K in its vessel rather than employer capacity had control over or knowledge of the open hatch and the failure to warn about it.

A-K responds that Breault was performing employment duties when he opened the hatch and when he threw the line to Morehead before the accident. Like Morehead, Breault had been hired both for carpenter and scowman duties. As is typical in the case of harbor workers, as distinct from land-based carpenters, the men were expected to lend a hand with supporting maritime chores as well as pursuing their particular construction trade. A-K maintains that its "active control" over or knowledge about the open hatch into which Morehead fell is therefore attributable to it as employer, not as vessel.

We agree with A-K that, for present purposes, the barges tended by its carpenters/scowmen were operated within A-K's control and knowledge qua employer. The barges, which were Breault and Morehead's workplace, can be analogized to the areas of a vessel taken over by longshore workers in the *Scindia* setting. Under the principles of that case, the stevedore — or, in a dual capacity case, the employer in a stevedore capacity — is ordinarily liable for the safety of the workplace and for any injuries that occur. The vessel, or the employer in its vessel capacity, is not implicated except in the unusual circumstance that the vessel itself continues to exercise active control over the work area.

We recognize that a competing analysis is possible, which, however, we reject. A court could attribute Breault's and Morehead's specific activities either to their employer or to the vessel, depending on how the court classified the objectives that those functions were thought to serve. One could inquire whether the hatch was opened to "help" the vessel (*i.e.*, to air it in preparation for returning it to the owner) or, instead, was opened in furtherance of some construction activity. In the former case, it could be argued that the vessel would be liable for any negligence. Such an analysis, however, would involve courts in endless semantical debate. Is an accident while tying up a barge at a construction site in furtherance of a "construction" objective or a "vessel" objective? If both objectives were being served, which predominates? And how does one square the fact that the employees here were hired by the employer for scowmen not just carpenter duties?

As noted, the statutory language speaks of the employer's liability as "exclusive." 33 U.S.C. § 905(a). The legislative history and the Court's precedents since 1972 make worker's compensation the primary remedy for an injured employee. The exception in section 905(b) for third-party negligence, narrowed in 1984,[16] explicitly requires a finding of vessel fault. We would be disregarding Congressional intent and might even be returning in the direction of the *Sieracki* doctrine which did not require such a showing, *see supra* n.6, if we were to attribute some of the regular duties that a harbor worker is employed to perform to the vessel, because of their speculative seaman-like character,

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16. *Cf. Roach v. M/V Aqua Grace*, 857 F.2d 1575, 1580 (11th Cir. 1988) ("While this [1984] amendment does not disturb the holding of *Jones & Laughlin Steel Corp.*, it does indicate a Congressional intent to limit invocation [sic] of the dual capacity doctrine under the Act.").

and only the residue to the employer. This approach would arbitrarily expand a defendant's liability qua vessel in a work arrangement not too different from that in *Scindia, i.e.*, one where the employees have effectively taken over the vessel to carry out their employment duties under their employer's supervision. A similar expansion of liability would follow from too easily assigning any knowledge of A-K employees (such as the carpenter foremen or worksite safety manager) to A-K in a vessel capacity. Neither the statute nor case law seems to us to support such an approach.

One of the essential purposes of the 1972 and 1984 Amendments was to provide employees and employers with a greater degree of certainty as to the coverage in effect. The legislative history of the 1984 Amendments documents this concern:

> [T]he situation in which a worker may be covered at one time, and not covered at another, depending on the nature of the work which the worker is performing at the time of the injury must be avoided since such a result would be enormously destabilizing, and would thus defeat one of the essential purposes of these amendments.

1984 U.S.C.C.A.N. at 2736-2737. A "functional" interpretation, hinging the type of liability on the nature and purpose of the duties being performed by covered employees at any given time, would increase uncertainty and the frequency of disputes over the scope of coverage. As Morehead's and Breault's employment contemplated that they would alternate frequently between construction and linehandling, a single, overall classification

of their duties is most appropriate for determining the types of remedies available. *Cf. Gay*, 915 F.2d at 1011 ("[T]o deny Gay [the employee] a cause of action in the morning but to grant him one in the afternoon is to make his rights under the Act as random and indiscriminate as the sea herself. This sort of incertitude is precisely what Congress attempted to eliminate from the LHWCA in both its 1972 and 1984 amendments.") (footnote omitted); *cf. Chandris*, 115 S. Ct. at 2187 ("In evaluating the employment-related connection of a maritime worker to a vessel in navigation, courts should not employ 'a "snapshot" test for seaman status, inspecting only the situation as it exists at the instant of injury'.... [A] worker may not oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker was engaged while injured.") (citations omitted).

We do not rule out the possibility that in a given case, an injury may be negligently caused by someone acting as the agent of the vessel owner rather than of the employer.[17] Here, however, we see no reason requiring the court to find that Breault, in leaving open the hatch, acted in any capacity other than as A-K'S employee rather than as A-K's agent in its shipowner's capacity. Morehead and Breault were hired to perform both construction and scowmen duties. A carpenter-supervisor instructed Breault to open the hatch. A-K's project safety manager generally oversaw the safety of work operations. Morehead has not shown why, in these circumstances, A-K qua vessel would have a duty of care to protect him against the open hatch.

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17. *Cf. Pichoff v. Bisso Towboat Co.*, 748 F.2d 300, 302-303 (5th Cir. 1984) (ruling in a dual capacity case that a general manager who ordered a hurried inspection of a fuel tank leak and failed to provide adequate lighting was acting as an agent of the vessel).

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We conclude that the district court was not clearly erroneous in viewing the open hatch as a condition temporarily created by A-K as employer, and affirm the district court's judgment in favor of A-K.

So ordered.

APPENDIX C — FINDINGS AND ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS DATED APRIL 29, 1994 IN *MOREHEAD V. ATKINSON-KIEWIT, J.V. ET AL.*

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.
91-11145-BA

MARK MOREHEAD,

Plaintiff,

v.

ATKINSON-KIEWIT, J.V. AND WOODS HOLE TOWING COMPANY, INC.,

Defendants.

FINDINGS AND ORDER
April 29, 1994

ALDRICH, *Senior Circuit Judge*.* There are many issues in this case, not the least of which are the basic facts. There were three to five barges lying at the north end of the pier at Davisville, Rhode Island. No two witnesses agreed to their relative positioning and none agreed with the pictures taken on January 29, 1991, the day that plaintiff, Mark Morehead partly fell into an open hatch. The choice here does come down either to barge 106, the Cher, or 707, the Hughes, both of which were flat-decked and bare of structures or equipment.

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* Sitting by designation.

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Starting at the beginning, tug captain Boyce testified that he had come that morning to take the Cher, barge 106. This fits in with the testimony of Collyer that he came to survey Cher in connection with her going off hire. Boyce's log shows that he brought 106 and secured to the pier at 0816, moving to the Hughes at 1300, where he was, at 1315, when "scowman falls. At 1325 he moved to a Water Barge. If there were any inconsistencies in his testimony at the trial, they were unimportant. Examination of the log suggests that it was written all at one time, viz., at the end of the day. Doubtless every move was not recorded. The court accepts Boyce's testimony that at the time of the accident the tug was alongside of the Hughes, which, in turn, was alongside of the Cher.

This finding conflicts with the pictures. We do not know when they were taken — Collyer recalls the date, but not the hour — that show the tug at 106. However, all of the witnesses, insofar as they made positive identifications, disagreed with the pictures. So, also, do the requests of both parties. The court, accordingly, does not accept them as contemporaneous with the accident.

It also may conflict with plaintiff's witness Breault, who, though he said the tug was tied to the Hughes, may have meant the Cher, because he said the Hughes was the barge he had opened up for a survey, and the Cher indisputably was a candidate for that. Collyer was doing only one survey, and it seems unreasonable to think that there was to be a second by a separate surveyor. At the same time, there could be other reasons for opening hatches, and the court agrees, based on their deer-horn appearance in the picture, that the covers on the Hughes were lying upside down (the horns being the-inside locks).

The result of this finding virtually eliminates any possibility that plaintiff was standing on the southeast corner of 106. This is to his advantage, because the two hatch openings there, closely flanking the cleat (Exh. 17), were so obvious that the court would find that plaintiff would have been clearly on notice and could have no claim.

This leaves two alternatives. If Boyce is accepted, Breault was on the southeast corner of 707 and plaintiff on the northeast corner of 106. Or, which the court finds more likely, plaintiff was on 707 and Breault on 106. In either event, however, the court would find a single open hatch (as shown in the pictures) insufficiently obvious. There would seem a presumption that an unmarked 18 inch opening on an otherwise solid deck is a failure of a reasonably safe proffer to one expected to walk thereon. The court would therefore find the barge, whichever one it was, unseaworthy, but under the statute, (33 U.S.C. § 905(b)) this is irrelevant. As negligence, the court does not find it negligence of primary defendant Atkinson-Kiewit viewed in its capacity as pro hac vice owner. Rather, it appears to be a temporary condition created by it solely in its capacity as charterer. *Cf. Scindia Steam Navigation Co., Ltd. v. De Los Santos,* 451 U.S. 156 (1981). These two capacities are legally separate, even though they be the same individual. *Cf. Castorina v. Lykes Bros. S.S. Co., Inc.,* 758 F.2d 1025, 1033 (5th Cir., *cert. denied,* 474 846 (1985)).

Correspondingly, even if it might be thought that plaintiff's injury was a misstep caused by co-employee Breault's negligently throwing a heavy line at him, this would be of no avail against defendant as pro hac vice owner. *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 531 n.6 (1983).

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This ruling eliminates any inquiry into whether the barge was a vessel within the statute.

The complaint and cross-claim are dismissed.

By the court,

s/ Bailey Aldrich
Senior Circuit Judge

APPENDIX D — OPINION EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED OCTOBER 10, 1996 IN *DIGIOVANNI, JR. V. TRAYLOR BROTHERS, INC.*

United States Court of Appeals
For the First Circuit

No. 94-1775

ROCCO P. DIGIOVANNI, JR.,

Plaintiff, Appellant,

v.

TRAYLOR BROTHERS, INC.,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

[Hon. Ronald R. Lagueux, *U.S. District Judge*]

Before

Torruella, *Chief Judge*,

Selya, Cyr, Boudin, Stahl and Lynch, *Circuit Judges*.

David B. Kaplan, Thomas M. Bond, The Kaplan/Bond Group, Paul V. Gallogly, and *Lovett, Schefrin, Gallogly & Harnett, Ltd.* on brief for appellant.

Andrew Rothschild, Eric D. Paulsrud, and *Lewis, Rice & Fingersh, L.C.* on brief for appellee.

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Myles W. McDonough and *Sloane and Walsh* on brief for J.M. Cashman, Inc. and Cashman, KPA, A Joint Venture, amici curiae.

October 10, 1996

OPINION EN BANC

Per Curiam. This appeal comes before the en banc court following the withdrawal of a two-to-one decision, issued on February 6, 1996, in which a panel of this court vacated a judgment of the United States District Court for the District of Rhode Island.[1] The en banc court similarly withdrew a decision handed down by a different panel that construed the same federal statute, namely, section 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, in a materially different way. *See Morehead v. Atkinson-Kiewit, J/V*, No. 94-1581. We granted rehearing en banc in both cases so as to afford us an opportunity to formulate a consistent rule in this circuit concerning the underlying question of statutory construction.

This case illustrates the problem. The defendant, Traylor Bros., Inc. (Traylor), contracted with the State of Rhode Island to construct a new bridge spanning Narragansett Bay from North Kingstown to Jamestown. Once work began, Traylor chartered tugboats and nonmotorized barges to assist it in building coffer dams for the new bridge. It hired pile-driving crews, carpenters, mechanics, and crane operators to man the barges.

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1. The district court's opinion is published. *See DiGiovanni v. Traylor Bros., Inc.*, 855 F. Supp. 37 (D.R.I. 1994).

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In mid-1988, Traylor towed the barge BETTY F. whose main deck was fitted with a crane and a vibratory pile-driving hammer, to the coffer dam construction site. Thereafter, Traylor moved the BETTY F to various other aquatic locations where it functioned as a stationary platform for the pile-driving crew. During most pile-driving operations, a supply barge, used to carry materials and to house the powerpack for the pile driver, was moored alongside the BETTY F. Traylor routinely assigned two employees as "tag men" to stand on the supply barge's main deck, grasp opposing guide ropes attached to the vibratory hammer, and steady the implement as it moved into position over the metal piles that were to be driven.

Beginning in September of 1988, worn fittings on the powerpack began to leak hydraulic fluid which spilled onto the deck of the supply barge. Crewmen complained unsuccessfully to their superiors and to the union steward about the hazard. They also tried to alleviate the problem from time to time, but to no avail.

On September 30, 1988, plaintiff Rocco DiGiovanni, Jr., who had been assigned by Traylor to work as a tag man on the supply barge, slipped on spilled hydraulic fluid as he started across the oil-covered deck to steady the BETTY F's pile-driving hammer with his guide rope. DiGiovanni was seriously injured and received workers' compensation benefits from Traylor under LHWCA § 904, 33 U.S.C. § 904.

Not satisfied with the avails of workers' compensation, DiGiovanni sued in the federal district court. His complaint noted that Traylor was not only his employer but also the owner *pro hac vice* of both the BETTY F and the supply barge. Accordingly, he asseverated that Traylor was liable in negligence pursuant to 33 U.S.C. § 905(b) in its capacity as vessel owner.

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The district court entered judgment for Traylor as a matter of law following a three-day bench trial. *See DiGiovanni v. Traylor Bros., Inc.*, 855 F. Supp. 37 (D.R.I. 1994). As mentioned earlier, a panel of this court vacated the decision. The panel held that the lower court had applied too restrictive a test to DiGiovanni's "dual capacity" claim. It was against that backdrop that we granted en banc review.

The en banc court has now issued its opinion resolving the companion case.[2] *See Morehead* v. *Atkinson-Kiewit, J/V*, __ F.3d __ (1st Cir. 1996) (en banc). This opinion clarifies the proper interpretation of LHWCA § 905(b) in "dual capacity" cases. In the view of the majority of the judges of the en banc court, *Morehead* is controlling here. Moreover, *Morehead* explicates our reasoning in sufficient detail that added comment on our part would be supererogatory.

It suffices to say that we are not persuaded by the distinctions that our dissenting brother raises. As we see things, *Morehead*, as applied to the facts of the instant case, plainly requires that we depart from the position taken by the panel and reinstate the district court's entry of judgment in Traylor's favor. We need go no further.

Affirmed.

- Dissenting Opinion Follows -

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2. The appeals in this case and in *Morehead* could not be treated in a single en banc opinion because a senior judge who had sat on the *Morehead* panel was eligible to participate in the en banc decision in that case, but not in this case. *See* 28 U.S.C. § 46(c); 1st Cir. Loc. R. 35.3.

Appendix D

CYR, *Circuit Judge* (dissenting). On the grounds set forth in *Morehead v. Atkinson-Kiewit, J/V*, __ F.3d __ (1st Cir. 1996) (Cyr, J., dissenting) [No. 94-1581 (1st Cir. Oct. __, 1996)], I respectfully dissent. The district court entered judgment for Traylor Brothers, Inc. in reliance on decisional law which presumes a legal fiction of dual capacity that conflicts with both the LHWCA and the Supreme Court decision in *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156 (1981). For two principal reasons, reliance on the dual capacity fiction in the present case is less appropriate than in *Morehead.*

First, unlike *Morehead* the present record leaves no doubt that "active control" over the workplace where DiGiovanni was injured shifted so haphazardly between Traylor Brothers' two fictional personae that it cannot reliably be determined which cadre of its employees Traylor Brothers expected to control workplace safety at the site of the injury. *See Morehead*, __ F.3d at __ n.6 [No. 94-1581, slip op. at 48 n.6] (Cyr, J., dissenting). Indeed, the district court acknowledged that the failure to stop the powerpack leakage for nearly a month amounted to negligence, and it is more than merely arguable that the negligence which caused DiGiovanni's injury is directly attributable to the absence of any clear delineation of responsibility by Traylor Brothers for its workplace-safety decisions. Thus, on the present record Traylor Brothers did not approach an efficient "bifurcation" of its "vessel-owner" and "construction" operations.

Second, during the extended period the powerpack leakage persisted, Traylor Brothers' supervisors and employees resorted to a series of patently inadequate stopgap measures (e.g., tying the powerpack with rags, spreading kitty litter on the oil-slickened deck). Further, even assuming that an open hatch

arguably might serve some legitimate vessel or construction purpose in a particular case, the faulty powerpack and its dangerous effluent not only represented an open and conspicuous hazard, but-served no conceivable purpose which might warrant the extended failure of Traylor Brothers' fictional "vessel owner" persona to second-guess its alter ego's decision not to stop the leak sooner. Even if one accepts the dubious premise that Traylor Brothers might establish an affirmative "bifurcation" defense on remand, DiGiovanni certainly generated a factual dispute as to whether Traylor Brothers' "vessel owner" persona knew of the abortive stopgap remedies, and should have known that its alter ego's decision not to undertake further remediation was "obviously improvident" *Cf. Scindia,* 451 U.S. at 175, 178-79 (noting genuine factual dispute whether vessel owner was liable because it knew that stevedore's decision not to fix defective winch for two days was obviously improvident, and remanding for further factual findings). I therefore would remand the case to the district court for further factual findings.

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED FEBRUARY 6, 1996, IN *DIGIOVANNI, JR. V. TRAYLOR BROTHERS, INC.*

United States Court of Appeals
For the First Circuit

No. 94-1775

ROCCO P. DIGIOVANNI, JR.,

Plaintiff, Appellant,

v.

TRAYLOR BROTHERS, INC.,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Hon. Ronald R. Lagueux, *U.S. District Judge*]

Cyr and Boudin, *Circuit Judges*,
and Keeton,* *District Judge*

David B. Kaplan, with whom *Thomas M. Bond*, *The Kaplan/Bond Group*, *Paul V. Gallogly* and *Lovett, Schefrin, Gallogly & Harnett, Ltd* were on brief for appellant.

Andrew Rothschild, with whom *Eric D. Paulsrud* and *Lewis, Rice Fingersh* were on brief for appellee.

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* Of the District of Massachusetts, sitting by designation.

Appendix E

February 6, 1996

CYR, *Circuit Judge.* Rocco P. DiGiovanni, Jr., appeals from a district court judgment denying his Longshore and Harbor Workers' Compensation Act ("LHWCA") claim for compensatory damages for injuries sustained while employed by defendant-appellee Traylor Brothers, Inc. ("Traylor"). For the reasons discussed in this opinion, we vacate the district court judgment and remand for further proceedings.

I

BACKGROUND

In 1986, Traylor contracted with the State of Rhode Island to construct a replacement bridge spanning Narragansett Bay from North Kingstown to Jamestown. Traylor chartered tugboats and nonmotorized barges to build coffer dams for the bridge.[1] It-hired pile-driving crews, carpenters, mechanics and crane operators to man the barges. In August 1988, the barge "BETTY F," whose main deck was fitted with a crane and a ten-ton vibratory pile-driving hammer, was towed by Traylor from Davisville, Rhode Island, to the coffer dam construction site. During work-hours, Traylor frequently moved the BETTY F to various locations on the Bay where it served as a stationary platform for the crane and the crew performing the pile-driving operations.[2] An unnamed supply barge, used to carry metal piles

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1. Coffer dams are metal forms imbedded in the bay floor with metal piles, pumped empty of seawater, and filled with concrete to form the foundation for bridge supports.

2. The BETTY F was not returned to Davisville at night. Instead, it was towed and moored a short distance from the coffer dams to avoid collision.

(Cont'd)

and supplies from Davisville and to house the power source ("powerpack") for the pile driver, was moored alongside the BETTY F during pile-driving operations. Traylor routinely assigned two employees as "tag men," to stand on the supply barge's main deck, grab hold of opposing guide ropes attached to the BETTY F's pile-driving hammer, and steady the hammer as it moved into position over the metal piles readied for driving.

Beginning in mid-to-late September 1988, worn fittings on the pile-driver powerpack began to leak hydraulic fluid onto the metal deck of the supply barge in the area where the tag men normally were stationed. Crew members tried to stem the fluid leakage from time to time by tying rags around the powerpack housing, and also applied kitty litter and chemical absorbents to the deck surface. Several crew members aboard the supply barge complained to their foreman and union steward about the hazard, and some complained directly to Traylor's on-site project superintendent. No repairs were attempted on the powerpack fittings, however, and hydraulic fluid continued to leak onto the supply barge deck.

On September 30, 1988, after he had been assigned by Traylor as a tag man on the supply barge deck, appellant DiGiovanni started across the oil-covered deck to steady the BETTY F's piledriving hammer with his tag line, slipped on the hydraulic fluid and was dragged across the deck by the guide-line until he collided with the stationary powerpack.

DiGiovanni soon began receiving workers' compensation

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A crew ship transported the BETTY F's crew between the vessel and Davisville each workday.

benefits from Traylor under the LHWCA. *See* 33 U.S.C. § 904. And since Traylor was not only DiGiovanni's employer but also the owner *pro hac vice* of the BETTY F and the supply barge, *see* 33 U.S.C. § 902(21) ("vessel" includes its "owner *pro hac vice*"), DiGiovanni also brought the instant negligence action in federal district court against Traylor in its capacity as vessel owner, demanding compensatory damages pursuant to 33 U.S.C. § 905(b).[3] The complaint alleged that Traylor had breached its duty of care because it knew or should have known of the

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3. LHWCA § 905 provides, in pertinent part:

> **(a) Employer liability; the failure of the employer to secure payment of compensation.** The liability of the employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee . . . .
>
> **(b) Negligence of vessel.** In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, *owner pro hac vice*, agent, operator, *or charterer* of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in

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continuing hazard posed by the erratic crane movements, the ongoing hydraulic fluid leakage from the powerpack, and the absence of a non-skid surface on the supply barge's main deck.

The district court entered judgment for Traylor following a three-day bench trial. *See DiGiovanni v. Traylor Bros., Inc.*, 855 F. Supp. 37 (D.R.I. 1994). Although the court found the hydraulic fluid leak to be an open and obvious hazard known for some period of time by all those working in the area," *id.* at 39-40, it denied recovery as a matter of law because all the instrumentalities of DiGiovanni's injury — the crane, powerpack, and the supply barge deck — were operated or controlled by Traylor *solely in its capacity as "employer,"* and not in its distinct capacity as "vessel owner." The district court explained its rationale as follows:

> This legal distinction may seem inequitable in that it allows a vessel owner to be a negligent employer and escape liability except for workers' compensation benefits.

(Cont'd)

> any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based on the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this section shall be exclusive of all other remedies against the vessel except remedies available under this Act.

33 U.S.C. § 905(a)-(b) (emphasis added). No longer material to the present discussion, DiGiovanni's Jones Act and general maritime claims were resolved in *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir.) (en banc), *cert. denied*, 113 S. Ct. 87 (1992).

> However, this apparent inequity may be quickly dismissed when it is remembered that immunity is the rule while vessel owner liability is the exception. . . . To merge the two capacities, permitting liability of the employer to be visited upon the vessel owner, would allow the exception to swallow the rule in clear violation of the intent of Congress.

Id. at 40, 42 (citing *Levene v. Pintail Enters., Inc.*, 943 F.2d 528, 531 (5th Cir. 1991), *cert. denied*, 504 U.S. 940 (1992); *Castorina v. Lykes Bros. S.S. Co.*, 758 F.2d 1025, 1032-33 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985)). Finally, the district court concluded that Traylor had breached none of the narrowly circumscribed duties of care imposed on vessel owners by LHWCA § 905(b). *Id.* at 42-43.

II

DISCUSSION

The contentions raised on appeal require us to scrutinize the structure, language, legislative history and policy of section 905(b).

A. The LHWCA Remedial Structure

Section 905(b) is relatively straightforward in its application to an injured maritime worker employed by a legal entity *distinct* from the vessel owner. For example, vessel owners often contract with independent stevedores to load or offload cargo. Upon the vessel's arrival in port, the owner normally "turns over" the vessel (or some specified area within the vessel) to the stevedore

to perform the delegated task. A stevedore's employee injured on the job cannot bring a negligence action against the *stevedore-employer.* The *exclusive* remedy available to the stevedore's employees, and one which accrues without regard to whether the stevedore was at fault, is the right to workers' compensation benefits under 33 U.S.C. § 904. *See* 33 U.S.C. § 905(a). On the other hand, a stevedore's employee may sue the vessel owner for damages to compensate for any injury caused by the vessel owner's negligence. Double recovery is avoided by requiring a prevailing employee to reimburse the stevedore-employer for all LHWCA compensation benefits previously received. *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 269-70 (1979).

The genesis of the current remedial scheme is best understood by contrasting it with its predecessor:

> Until 1972, an injured longshore worker could sue the *vessel owner* on two distinct legal theories: negligence and breach of the warranty of "seaworthiness." "Unseaworthiness" could be established more easily than negligence, simply by showing that some condition or appurtenance on board the vessel at the time of the accident was unreasonably hazardous, even if the stevedore-employer was the sole cause of the hazard. Vessel owners thus became virtual insurers of the on-board safety of longshore workers. Although the only legal recourse available to the nonnegligent vessel owner was an indemnification claim against the stevedore-employer, even that remedy was

> unavailable unless the hazardous condition or appurtenance was due to the stevedore's negligence.

Keller v. United States, 38 F.3d 16, 23 (1st Cir. 1994) (citations omitted). Even in instances where vessel owners received indemnification from negligent stevedore-employers, however, the unwieldy "triangulation" of litigation contemplated under this system nullified the principal advantage that the LHWCA compensation scheme had been designed to afford negligent maritime employers — assurance that their *unconditional* obligation to pay preset workers, compensation benefits would protect them from exposure to tort suits by maritime workers. In order to stem such litigation, Congress amended the LHWCA by barring all indemnification agreements and making the vessel owner liable on no ground other than its *own negligence*. Thus, a vessel owner is not liable for the negligence of its stevedore or that of other persons not in the employ of the vessel owner.

B. Duties of Care Owed By "Single Capacity" Employers

The 1972 amendments to the LHWCA preserved a right of action for negligence against the vessel owner, *without defining the nature and scope of the duties of care owed* by *the vessel owner*, and the resulting scope of liability. In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 165-66, 167 (1981), the Supreme Court held that Congress, by discarding the no-fault "unseaworthiness" claim as a remedy, intended the duties of care owed by a vessel owner under amended section 905(b) to be narrowly circumscribed through reference to the event traditionally known as "turnover" — the vessel owner's surrender of custody or control of the vessel (or a portion thereof) to an independent stevedore.

Appendix E

Incident to turnover, a vessel owner owes only two *narrowly defined* duties of care to the stevedore's employee: a duty of safe condition and a duty to warn. First, because stevedores generally are presumed to possess greater stevedoring expertise than are vessel owners, under the narrowly defined duty of safe condition "a vessel owner may 'reasonably' rely on the stevedore-employer's supervision of its own employees in their interaction with and avoidance of 'obvious' or 'anticipated' hazards foreseeably associated with stevedoring on board the owner's vessel." *Keller*, 38 F.3d at 23. Second, under its narrowly defined duty to warn, the vessel owner "must alert the stevedore-employer to any latent or concealed defect including 'any hazards on the ship or with respect to its equipment' which are '*known* to the vessel [owner] or *should be known* to it in the exercise of reasonable care' and which 'would likely be encountered by the stevedore in the course of his cargo operations[,] are *not known* by the stevedore[,] and would *not* be *obvious* to or anticipated by him if reasonably competent in the performance of his work.' " *Id.* at 23-24 (quoting *Scindia*, 451 U.S. at 167 (emphasis added)).

Once the two duties of care incident to "turnover" are met and the vessel or vessel area has been turned over to an independent stevedore, the three *continuing* duties of care incumbent upon the vessel owner are even more constricted:

> First, the vessel owner might remain under [ ] a [continuing] duty were it to retain actual physical control or custody of a portion of the vessel, or participate in stevedoring operations. Second, a duty to intervene might attach in the event the vessel owner were to acquire actual knowledge that "unsafe

> conditions" had developed in the vessel's appurtenances since turnover, that the stevedore will not address the unsafe condition, and that the stevedore's decision not to remedy the developing hazard was "obviously improvident" in the circumstances. Third, even absent actual control, participation or knowledge, a post-"turnover." duty may arise if the vessel owner was obligated, by contract, statute or custom, to monitor stevedoring operations for the purpose of detecting and remedying unsafe conditions.

Id. at 32 (citations omitted).

C. Law Applicable to "Dual Capacity" Cases

For reasons immediately apparent, the turnover-based dichotomy in *Scindia* is best suited to circumstances in which the vessel owner and the stevedore-employer are distinct legal entities [hereinafter: "single capacity" cases]. But where, as here, the vessel owner itself employs longshore workers to perform various tasks on board its own vessel [hereinafter: "dual capacity" cases], the purport of section 905(b) is decidedly less clear.

The Supreme Court has held, however, that an injured longshore worker who receives LHWCA compensation benefits is *not* barred from bringing a negligence action against his vessel-owner employer under section 905(b), notwithstanding the seemingly *unqualified* provision in section 905(a) that LHWCA compensation benefits are the "exclusive" liability

incurred by maritime employers. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 530 (1983); *see also supra* note 3. The Court reasoned in *Pfeifer* that had the Congress intended to impose an outright ban against all "dual capacity" suits there would have been no need to insert the second sentence in section 905(b) *limiting* the permissible scope of such suits. *See id.* (citing 33 U.S.C. § 905(b) ("If such person was *employed by the vessel* to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel.")) (emphasis added). Moreover, Congress presumably was aware of the Court's supple pre-1972 interpretation of the so-called "exclusivity" provision in the LHWCA. *See Reed v. Yaka*, 373 U.S. 410 (1963) (holding that an injured employee may maintain an "unseaworthiness" action against vessel owner who was also the injured employee's LHWCA "employer"). Yet far from repudiating *Reed*, relevant legislative history *confirms* a congressional intendment "that the rights of an injured longshoreman . . . should not depend on whether he was employed directly by the vessel or by an independent contractor." *Pfeifer*, 462 U.S. at 531-32 (quoting H.R. Rep. No. 92-1441, 92d Cong., 1st Sess. 7-8, *reprinted in* 1972 U.S.C.C.A.N. 4698, 4705).[4] Nonetheless, and without elaboration, the Court

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4. The full excerpt states:

> The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S.S. Yaka*, 373 U.S. 410 (1963), and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. [731] (1967), held that the unseaworthiness

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appended the following footnote to its holding in *Pfeifer*: "Of course, § [905(b)] does make clear that a vessel owner acting as its own stevedore is liable only for negligence *in its 'owner' capacity,* not for negligence *in its 'stevedore' capacity." Id.* at 531 n.6 (emphasis added). Thus, the seed planted in footnote 6 germinated the controversy presently before us: when an injured longshore worker sues, may a "dual capacity" employer escape liability by contending that any negligence on its part is traceable exclusively to its "stevedore-employer" role, and that *Scindia* therefore entitles it, *qua* "vessel owner," to don its fictional *alter ego* mantle as stevedore-employer? Two other courts of appeals have adopted divergent views.

Like the district court in this case, the Fifth Circuit considers this legal fiction central to the integrity of the LHWCA as a

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> remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he is employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to shipbuilding or repair employees employed directly by the vessel. *The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.*

H.R. Rep. No. 92-1441, 92d Cong., 1st Sess. 7-8, *reprinted in* 1972 U.S.C.C.A.N. at 4705 (emphasis added).

prototypical workers' compensation statute. *See Levene*, 943 F.2d at 531 (citing *Castorina*, 758 F.2d at 1032-33 (noting that, because legislative history contemplates that all maritime employees receive the "same" remedy, "[w]e can find no reason to impose on a shipowner a greater duty of care toward longshoremen because the shipowner conducts its own stevedoring operations")). In other words, a contrary construction of section 905(b) would deprive "dual capacity" employers of the anticipated return for their presumed *quid pro quo;* that is to say, the burden of contributing to the section 904 workers' compensation scheme would no longer be balanced by the broad "exclusivity" protection supposedly afforded by section 905(a).

On the other hand, the Second Circuit has noted that shoehorning "dual capacity" employers into the traditional *Scindia* mold creates serious anomalies and artificialities not present in "single capacity" cases. *See, e.g., Fanetti v. Hellenic Lines, Ltd.*, 678 F.2d 424, 428 (2d Cir. 1982) (" '[A] [jury] charge which relieves a shipowner of liability for a dangerous condition which was "known to the stevedore or to any of its employees' is clearly inappropriate where the shipowner, itself, is the stevedore.' ") (citing *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 508 (2d Cir. 1976)), *cert. denied*, 463 U.S. 1206 (1983). For example, as was observed in *Fanetti*:

> *Where . . . there is no independent contractor, it is* part of *the ship's duty to exercise reasonable care* to inspect its own workers' workplace, to remove grease spills, etc. In such a case there is no "independent contractor" with primary responsibility upon whom the ship may properly rely . . . . Things

> are very different when the longshoreman works for an independent stevedore who has primary responsibility for the workplace.

Id. (quoting *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682, 689-90 (2d Cir.) (Friendly, J., dissenting, in part), *cert. denied*, 439 U.S. 929 (1978)) (emphasis added).[5]

D. Standard of Review

DiGiovanni contends that the district court erred as a matter of law in applying the bifurcated duties of care endorsed in *Levene* and *Castorina* to an entity like Traylor.[6] While a single entity arguably might "turn over" custody and control of a vessel to its alter ego, *qua stevedore* (*i.e.*, as an onloader or offloader of cargo), the very nature of Traylor's construction operations aboard the BETTY F and the supply barge demonstrates unmistakably that a vessel owner contractually obligated to *use* its own vessel to perform a maritime construction project *can never relinquish control or custody of the vessel.*[7]

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5. Although *Fanetti* preceded, whereas the Fifth Circuit decision came after, *Pfeifer*, there is no indication that the Second Circuit has altered its position. Thus, there presently exists a circuit split.

6. The duty of care owed by a vessel owner under § 905(b) presents a pure question of law, subject to plenary review. *See Keller*, 38 F.3d at 13.

7. In the alternative, DiGiovanni argues that the implicit factual finding by the district court that a "turnover" occurred, as between the Traylor *alter egos*, is clearly erroneous, and if a "turnover" did occur, the factual finding that Traylor, *qua* vessel owner, did not breach its *Scindia* duties of care is clearly erroneous as well. Since we accept DiGiovanni's threshold legal contention, we need not reach these alternative arguments.

Appendix E

E. The Statute and its Legislative History

Normally, the task of interpretation must begin with the statutory language. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). However, since section 905(b) merely creates a right of action in negligence against vessel owners, without defining the duties of care incumbent upon either "single capacity" or "dual capacity" vessel owners, we turn to relevant legislative history for guidance. *See Cabral v. INS*, 15 F.3d 193, 194 (1st Cir. 1994) (where statute is silent or ambiguous, legislative history may be consulted).

As it turns out, Congress intentionally left a substantive gap in section 905(b), expecting the courts to define the precise nature and scope of a vessel owner's duties of care thereunder. *See Scindia*, 451 U.S. at 165-66, 167 ("Section 905(b) did not specify the acts or omissions of the vessel that would constitute negligence. . . . Much was left to be resolved through the 'application of accepted principles of tort law and the ordinary process of litigation.' " (quoting H.R. Rep. 92-1441)). The remaining legislative history contains a statement that the "same *principles* should apply in determining the liability of the vessel" in both "single capacity" and "dual capacity" cases. H.R. Rep. No. 92-1441, 92d Cong., 1st Sess. 7-8, *reprinted in* 1972 U.S.C.C.A.N. 4698, 4705 (emphasis added). We examine this general statement in some detail.

Most importantly, this legislative history lends no support to the statutory interpretation proposed by Traylor. Insofar as the quoted statement might be thought to particularize the appropriate duties of care, it would conflict directly with the preference previously expressed in the same House Report, *see supra*, that interstitial interpretations be left to the courts.

Scindia, 451 U.S. at 165-66, 167. Further, viewed in context, *see supra* note 4, this House Report language appears immediately after a discussion of Congress' intention to abrogate the *Reed* and *Jackson* holdings, which held that "dual capacity" employers were as vulnerable to "unseaworthiness" claims under the pre-1972 LHWCA as were non-employer vessel owners. Thus, even viewed in the light most favorable to Traylor, we think the House Report reference to "same principles" is most likely a simple caution that henceforth, by dint of the 1972 amendments, *both* "single capacity" and "dual capacity" cases are subject to the same *negligence* liability *principles*, *not* to the heightened standards of care governing "unseaworthiness" claims — a differential that would otherwise have afforded employees in "dual capacity" cases a decided *advantage* in litigation. *See, e.g., Shaw v. North Pennsylvania R. Co.*, 101 U.S. 557, 565 (1879) ("No statute is to be construed as altering the common law further than its words import."); *but cf. also infra* p. 24 (noting that the traditional imputation of knowledge and "control" approaches in tort law are more faithful to legislative history since they apply the "same [Scindia] principles" to both single and dual capacity employers).

Under *either Fanetti* or *Levene*, moreover, both "single" and "dual" capacity vessel owners *are* subject to the "same" standards of care; the differences are purely circumstantial. As a general rule, the notice or knowledge — as well as the foreseeability — attributable to a "dual capacity" employer will be greater simply because a vessel owner which hires its own longshore or harbor workers does not *in fact* "turn over" its vessel to a separate entity. Rather the "dual capacity" employer remains in control — at the least to some extent (both in time and space) — and often in complete control of the entire vessel and its appurtenances throughout the relevant time period. Thus, the

fuller range of knowledge and foreseeability normally accompanying constant and total control represents a *compelling* reason -consistent with general tort principles, *see, e.g., Illinois Constructors Corp. v. Logan Transp., Inc.*, 715 F. Supp. 872, 882 n.22 (N.D. Ill. 1989) (agent's knowledge is imputable to principal, exposing principal to direct liability in tort); *Allen v. Prudential Property & Cas. Ins. Co.*, 839 P.2d 798, 806 (Utah 1992) (same); *People v. American Medical Ctrs. of Michigan, Ltd.*, 324 N.W.2d 782, 783 (Mich. Ct. App. 1981) (same), *cert. denied*, 464 U.S. 1009 (1983) — for broad accountability in tort on the part of the "dual capacity" employer.

Finally, other categorical language in the House Report cuts deeply into Traylor's contention: "*nothing* in the [LHWCA] is intended to derogate from the vessel's responsibility to take appropriate corrective action *where it knows or should have known about a cancerous condition.*" H.R. Rep. No. 92-1441, 92d Cong., 1st Sess. 6, *reprinted in* 1972 U.S.C.C.A.N. 4698, 4704 (emphasis added). "So, for example, where the longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel *for negligence.* To recover, he must establish that: (1) the vessel put a foreign substance on the deck, *or knew that it was there*, and willfully or negligently failed to remove it; or (2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care under the circumstances." *Id.* (emphasis added).

F. The Controlling Judicial Precedent

Absent conclusive evidence of specific congressional intent in the statute itself or its legislative history, we consult more

recent case law with a view to whether, at Congress' invitation, *see supra* Section II.E, the question before us has been resolved through the "application of accepted principles of tort law and the ordinary process of litigation." H.R. Rep. No. 92-1441, 92d Cong., 1st Sess. 6, *reprinted in* 1972 U.S.C.C.A.N. at 4704. As we have noted, *Scindia* discussed duties of care only in the context of negligence claims against a "*single capacity*" vessel owner. Footnote 6 in *Pfeifer*, on the other hand, is unelucidated dictum. Of course, great deference is accorded considered Supreme Court dicta. *See, e.g., Bank of New England Old Colony, N.A. v. Clark*, 986 F.2d 600, 603 (1st Cir. 1993). Yet there is no exegetic discussion of this issue, the LHWCA's legislative history, or supportive Supreme Court precedent,[8] either in footnote 6 or elsewhere in the *Pfeifer* opinion. Thus, footnote 6 ultimately leaves open the question with which we are presented, as does the House Report's reference to "same principles," since under both the *Castorina* and the *Fanetti* models, a "dual capacity" employer is held liable in its "vessel owner" capacity only. Absent controlling precedent, we turn to traditional tools of statutory interpretation.

G. Traditional Tools of Statutory Interpretation

Confronted with a measure of congressional reticence, but also with the explicit legislative directive that the courts shape the legal duties applicable in both single and dual capacity cases

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8. Longshoreman Pfeifer slipped and fell while on board a barge owned by his employer, which had "negligently failed to remove [ice] from the gunnels." *Pfeifer*, 462 U.S. at 526. The district court entered judgment for Pfeifer and the court of appeals affirmed. The only liability-related issue before the Supreme Court was whether § 905(a) barred Pfeifer's suit outright. The parties never raised the question whether the district court had erred by attributing the negligence to the defendant in its capacity as "employer."

based on the "same [tort] principles,'" we next examine the policies evident in the statute as a whole. *See Thinking Machs. Corp. v. Mellon Fin. Servs. Corp.*, 67 F.3d 1021, 1024 (1st Cir. 1995). Ultimately, we are persuaded that it would contravene congressional policy to invoke the legal fiction that Traylor (*qua* vessel owner) was acting solely in its "stevedore-employer" capacity when it hired and directed the work of its employees on the oil-slickened deck of its supply barge.

This conclusion likewise appears warranted from an independent perspective; that is to say, the one presumptive principle of statutory interpretation that *unquestionably* does apply: the LHWCA "must be *liberally construed in conformance with its purpose*, and in a way which avoids harsh and incongruous results." *Reed*, 373 U.S. at 415 (emphasis added). *See Voris v. Eikel*, 346 U.S. 328, 333 (1953); *see also Hogar Agua y Vida en el Desierto v. Suarez-Medina*, 36 F.3d 177, 181 (1st Cir. 1994) (remedial statutes are to be broadly construed).[9] Consistent with this instruction, unless Traylor is able to demonstrate a legislative purpose behind the LHWCA that is either fostered by the *Castorina* rule or disserved by *Fanetti*, the benefit of the doubt belongs to DiGiovanni.

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9. This interpretive rule generally is used to bring injured maritime workers within the workers' compensation scheme when the terms of § 904 are ambiguous. Insofar as maritime workers are deprived of other common law remedies under § 905(a), a liberal interpretation will not always be synonymous with "favorable" in fact. In *Reed* and *Jackson*, *see supra* note 4, however, the Court made clear that this interpretive principle may be used to *expand* a covered worker's *adjunct remedies* under the LHWCA, above and beyond the remedy directly provided in § 904. The legislative history of the 1972 LHWCA amendments appropriately questions *Reed*, but only with respect to the continued availability of the "unseaworthiness" remedy previously afforded against "dual-capacity" employers, *see supra* note 4, leaving undisturbed Reed's pro-employee interpretive presumption in the face of other unresolvable statutory ambiguities.

Appendix E

The main difficulty with the decision below relates to its assumption that the *Fanetti* interpretation would "allow the exception [of vessel-owner liability] to swallow the rule [of employer immunity] in clear *violation of the intent of Congress.*" *DiGiovanni*, 855 F. Supp. at 42 (emphasis added). The district court opinion stressed this point with its citation to the "exclusivity" provision in the Rhode Island Workers' Compensation Statute. *See* R.I. Gen. Laws § 28-29-20 (1994). We believe the assumption is mistaken.

First, because "single capacity" employers would still retain all their section 905(a) protections, the *Fanetti* approach — though it significantly limits LHWCA immunity — in no sense "swallows," eviscerates, or renders superfluous the LHWCA immunity available to "single capacity" employers. Nor is there affirmative evidence, either in the statute or its legislative history, that Congress ever envisioned a perfect parallelism.

Second, *Pfeifer* demonstrates that the supposedly unlimited "exclusivity" provision in section 905(a) is much more flexible than the land-based workers, compensation statutes enacted in most states, which in comparable contexts would not permit an injured worker even to *bring* a negligence *suit* against the employer as the owner of the *property* on which the worker was injured. *See generally* 2A Arthur Larson, *Workmen's Compensation Law* § 72.82, at 14-234 (1983).[10] Thus, we think

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10. Many states do recognize a "dual capacity" doctrine, in circumstances inapposite here, where the employer acts in a *non-landowner* capacity. For example, a worker injured by a product manufactured by its employer would not be barred from bringing a product liability claim for breach of its duty to the consuming *public*, to make a reasonably safe product. *See*, e.g., *Schump v. Firestone Tire & Rubber Co.*, 541 N.E.2d 1040, 1042-43 (Ohio 1989).

it is quite clear that Congress did not envision section 905 as an exact analog to state workers' compensation schemes. *See* H.R. Rep. No. 92-1441, 92d Cong., 1st Sess. 6, *reprinted in* 1972 U.S.C.C.A.N. 4698, 4704 (emphasis added); *supra* Section II.E.

Third, Traylor suggests that it would be unreasonable to suppose that Congress intended to burden "dual capacity" employers under the LHWCA with mandatory contributions to the section 904 workers' compensation scheme, *without a corresponding benefit.* Relying on the same inapposite analogy to state workers' compensation statutes, Traylor argues that a total release from *all* tort liability for employee injuries is the *essential quid pro quo* for subjecting LHWCA employers to the section 904 workers' compensation scheme.

We acknowledge, of course, that "dual capacity" employers would not gain *as much* benefit under the LHWCA as would "single capacity" employers. But Traylor's contention begs the question: whether *Congress intended* that result. The statute books are chockablock with remedial provisions imposing burdens on various types of entities which are accorded *no* corresponding benefit. Moreover, the significantly distinct circumstances encountered by "single capacity" and "dual capacity" employers — particularly the widely divergent degree to which each type employer retains effective *control* over its vessel — would seem a highly plausible explanation for Congress' decision to leave interstitial decision-making to the courts rather than define the precise nature and scope of these vessel owners' duties of care. *See supra* Section II.E.

For instance, the *Scindia* paradigm recognizes that a "single capacity" vessel owner is subject to comparatively relaxed duties of care because it forfeits virtually all control over ensuing events once it turns its vessel over to another legal entity (and that

entity's employees) in relation to which the vessel owner enjoys *no* presumptive right of control absent specific contractual arrangements to the contrary. Even then, however, a "single capacity" vessel owner must shoulder *continuing duties to intervene* as necessary to correct hazardous conditions in any part of the vessel remaining within its control, as well as when it acquires actual knowledge of a developing hazard posed by the vessel's appurtenances (*e.g.*, the supply barge's leaking powerpack), and knows that the independent stevedore's failure to remedy the hazard is plainly improvident. *See Keller*, 38 F.3d 32; *cf. also Melanson v. Caribou Reefers, Ltd.*, 667 F.2d 213, 214 (1st Cir. 1981) (noting that *Scindia*'s "obviously improvident" standard of care generally pertains only to hazards developing in vessel's *gear,* rather than to nonappurtenances, like cargo).

On the other hand, what can it matter whether a "dual capacity" vessel owner knows, as it surely does, that its decision — *qua* independent stevedore — not to eliminate a known hazard, is or is not improvident? After all, a vessel can exercise control, and acquire knowledge, *only* through its owner and crew, 33 U.S.C. § 902(21) ("vessel" includes "agents" and "crew members"), and in "single capacity" cases the control exercised and the knowledge acquired by these agents normally is *imputed* to the vessel. In the instant case, since Traylor is deemed to have been wearing the hats of both its fictional personae, through its control of *all actors* aboard its vessel, the *Scindia* distinctions devolve at best into a metaphysical exercise, and at worst into a strong inducement to "dual capacity" vessel owners to turn a blind eye to hazardous work conditions within their exclusive control. *See Fanetti*, 678 F.2d at 428. Thus, we believe it would carry the "dual capacity" fiction much too far from its *Scindia* context to extend it to the present setting, because it runs directly counter to the clear statement of

congressional intent in the LHWCA legislative history; viz., that the "*same principles* [i.e., the *Scindia* duties of care] should apply in determining the liability of the vessel " in both "single capacity" and "dual capacity" cases. *See* H.R. Rep. No. 921441, 92d Cong., 1st Sess. 7-8, *reprinted in* 1972 U.S.C.C.A.N. 4698, 4705 (emphasis added).

The Traylor apology for the "dual capacity" fiction undoubtedly would be somewhat more compelling were there a discernible *temporal* demarcation for the differing roles incumbent upon its alter egos, such as the determinative one-time "turnover" in a "single capacity" case that results in a clearly distinguishable realignment of responsibilities in keeping with the accompanying change in control. Given the nature of the Jamestown Bridge Project, however, Traylor was *required* to use the BETTY F and the supply barge, *alternately*, as a means of transporting the crane, its operating employees and supplies to the designated work sites on Narragansett Bay *and* as an instrumentality for constructing the coffer dams. Sometimes, in fact, it appears that these discrete operating modes either merged, or alternated with such frequency, that it could not be ascertained with any confidence, *even on the date of the accident*, whether Traylor's supply barge crew or its construction team "alter ego" had custody and control of the deck of the supply barge. *Cf. Masinter v. Tenneco Oil Co., Inc.*, 867 F.2d 892 (5th Cir. 1989) (noting that "the present case does not involve a vessel owner 'turning over' the control of a vessel to a stevedore or independent contractor. Rather, [the vessel owner] was *contractually bound* to conduct the drilling operations and remained in control of the vessel to effectuate this obligation").[11]

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11. We recognize that *Masinter* is distinguishable from *Levene* and *Castorina* because the vessel owner was not Masinter's *employer;* hence was not protected by the § 905(a) immunity provision. The *Masinter* reasoning (Cont'd)

Appendix E

Unlike their "single capacity" counterparts, moreover, "dual capacity" vessel owners presumably derive economic benefit as a result of their decision to act in a dual capacity. In fact, this benefit itself may well constitute an adequate counterbalance to whatever "heightened" duty of care may attend their decision.

> A shipowner is, of course, at liberty to refrain from hiring an independent stevedoring contractor. Presumably it does so to save money. However, that saving is accomplished at the cost of not having an independent expert on board. As myriad cases in this field demonstrate, the presence of the expert independent stevedoring contractor furnishes the shipowner with significant protection, in the form of insulation from liability for its own acts which would otherwise attach. But *the shipowner cannot save the premium and still claim the protection.*

Fanetti, 678 F.2d at 428 (emphasis added). Indeed, permitting the dual-capacity employer to compartmentalize its "knowledge" between its two artificial personae in these circumstances would undercut the primary LHWCA policy goal identified in *Scindia*; that is, there would be *no* economic incentive for shipowner-employers to hire independent stevedoring companies, which generally possess greater expertise in conducting longshoring activities with maximum levels of worker safety. Such an artificial rule inevitably would increase the hazardous working

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(Cont'd)

nonetheless raises a legitimate question as to whether the Fifth Circuit would extend *Castorina* to a "dual capacity" employer in the circumstances presented here.

conditions encountered by longshore and harbor workers, and undermine the spirit of the LHWCA.

Contrary to Traylor's contention, and notwithstanding whatever else may be said, "dual capacity" employers obtained an important benefit from the 1972 amendments in return for the burden assumed pursuant to the section 904 workers' compensation scheme: "dual capacity" employers are no longer subject to the far more onerous *strict liability claims for breach of the warranty of seaworthiness*, but only to tort liability based on their failure to exercise reasonable care to avoid or correct reasonably foreseeable hazards. We discern no overriding legislative policy behind the 1972 amendments which would entitle these employers to the benefit of any and all doubt in construing the "exclusivity" provisions. On the contrary, the legislative history plainly discloses that Congress meant to eliminate the wasteful litigation burdening the courts under the pre-1972 LHWCA; viz., the "triangulation" in litigation caused by the confluence of a longshore worker's strict liability claim for "unseaworthiness" against the vessel owner and the vessel owner's claim for indemnification from a negligent stevedore-employer. *See supra* Section II.A.

III

CONCLUSION

We hold that the unreasonably hazardous condition aboard the supply barge had persisted for an extended period of time preceding DiGiovanni's injury, during which time various Traylor employees acquired actual knowledge of the developing hazard and their employer's failure to "intervene" to correct the

hazardous condition. Thus, a genuine and material issue was presented for the factfinder, as to whether Traylor's failure to intervene breached its continuing duties of care under *Scindia*. We note, further, that the factfinder implicitly found the failure to intervene to remedy the oil leak "obviously improvident," given the utter absence of any reasonable explanation for allowing the hazardous condition to go unremedied for the extended period preceding the accident.[12]

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12. No doubt the circumstances in this case set it apart from many. Unlike the comparatively stationary BETTY F, at night between workdays Traylor often towed the unnamed supply barge — on which DiGiovanni was working when he was injured — to Davisville. The alleged negligence on the part of one or more crew members *of the supply barge* lay in the failure to take corrective action to arrest the developing hazardous condition (i.e., the month-long hydraulic fluid leakage from the powerpack onto the supply barge deck) long after it had become apparent that Traylor's stevedoring employees had not corrected, and foreseeably would not correct, the hazardous condition absent action on the part of the vessel (the supply barge). Since the supply barge had been moving regularly in navigable waters, between workdays, to and from Davisville and the BETTY F, which was moored at the work site, the supply barge was under tow in navigable water.

From time to time while the supply barge was still under way and not yet moored either at Davisville or adjacent to the BETTY F, a Traylor employee would be the only person on board the supply barge. Thus, either the supply barge was crewless while still under way, or it was under way in navigable waters with no crew other than Traylor employees. Each time a Traylor employee was on board the supply barge in these circumstances, that Traylor employee had an opportunity to observe the ongoing and worsening hazard of the oil-covered deck near the powerpack. Any negligence of a Traylor employee in these precise circumstances, when no other person was aboard the supply barge and it was under way, plainly constituted negligence of the vessel (the supply barge).

(Cont'd)

Appendix E

The parties agree that there is no clear error in the district court finding that Traylor was negligent in its stevedore-employer capacity, and that remand is required for the calculation of compensatory damages in the event we reject the legal conclusion that the "constructive knowledge" imputable to a "dual capacity" employer is subject to the limitation adopted in *Castorina*. Since we reject Traylor's conclusion, as both unsound and inapposite to the particular circumstances in this case, we vacate the district court judgment and remand for further proceedings.

The district court judgment is vacated and the case is remanded for further proceedings consistent with this opinion. Costs to appellant.

- Dissent Follows -

(Cont'd)

As in the physical universe, nature abhors a vacuum, so in the somewhat metaphysical legal universe admiralty loathes the notion of a vessel under way with no crew. During the time the supply barge was under way with no person aboard other than a Traylor employee, that employee, at least, was a crew member of the supply barge. Even assuming the crew members of the BETTY F can be conceptualized as the crew of the supply barge while it was under tow with no person aboard, when it became necessary to have a person aboard to perform functions necessary to casting off or docking, that person necessarily was a member of the crew of the vessel (supply barge). To hold otherwise would be to depart not only from a core admiralty concept, but also from the rationale of the Supreme Court in *Scindia*, *see* 451 U.S. at 172-79, and the rationale of this circuit in *Keller*, 38 F.3d at 22-33. Thus, during such discrete intervals at least, the supply barge was, in fact, within the exclusive and "active control" of the vessel owner. *Morehead v. Atkinson-Kiewit*, No. 94-1581, slip op. at [2526] (1st Cir. Jan. , 1996) ("The vessel, or the employer in its vessel capacity, is not implicated except in the unusual circumstance that the vessel itself continues to exercise active control over the work area.").

Appendix E

BOUDIN, *Circuit Judge*, dissenting. The panel majority has written a thorough and powerful opinion in a difficult matter. Yet, while recognizing the case to be close, I believe that the district court reached the correct result, for reasons that are substantially those set forth in *Morehead v. Atkinson-Kiewit J.V.*, No. 94-1581, 1st Cir., argued March 2, 1995, and decided this day.

APPENDIX F — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND DATED JUNE 9, 1994 IN *DIGIOVANNI, JR. V. TRAYLOR BROTHERS, INC.*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 89-0369L

ROCCO P. DiGIOVANNI, JR.,

Plaintiff

v.

TRAYLOR BROTHERS, INC.,

Defendant

MEMORANDUM AND ORDER

RONALD R. LAGUEUX, Chief Judge

This matter is before the Court for decision following a bench trial. Plaintiff seeks recovery under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, for injuries he received while working for defendant on its barge used in the construction of the Jamestown Bridge.

FACTUAL SITUATION

Defendant is an Indiana corporation and had a place of business in Saunderstown, Rhode island in mid 1988, when it took over the construction of the Jamestown Bridge from the

prior contractor. Plaintiff was an employee of defendant who was hired as a carpenter/piledriver. Plaintiff and his colleagues were assigned the task of constructing coffer dams in the Narragansett Bay. A coffer dam is a metal enclosure built in the water. After construction of the coffer dam, water is pumped out so concrete can be poured in for building structures, such as bridge piers. In order to build a coffer dam, the pile driving crew sinks metal plates, or "piles", into the ground. In this case, these piles were driven with a vibratory hammer. The vibratory hammer is a ten ton hydraulic device which is suspended over the piles from a crane. The hammer is susceptible to wind currents when it is dangling from the crane. In order to counter the effects of the wind, two ropes are affixed to the hammer and used to steady it. These ropes are called "tag lines" and the individuals using them are known as "tag men."

The work on the coffer dams for the Jamestown Bridge project was performed from barges on the Bay. Plaintiff was part of a work crew that utilized a barge named the Betty F which was owned by defendant. The Betty F was moored on the Bay during the construction phase of the project but was maneuvered about on the water at times in order to be positioned for construction of the coffer dams and bridge piers. On its deck were the crane and the hammer plus various equipment and two small shacks. A supply barge was used to bring materials and equipment from shore and was usually moored alongside the Betty F during piledriving activity. On the deck of the supply barge were the steel piles used to build the coffer dams as well as the power pack for the vibratory hammer. The power pack was connected to the hammer via long hoses. The power pack pumped hydraulic fluid through these hoses in order to drive the hammer.

Appendix F

For at least a week before the accident which is the subject of this lawsuit, hydraulic fluid had been leaking from the power pack onto the metal deck of the supply barge. This hazard was open and known by all of the workers who testified. Crew members first used a chemical absorbent known as "Speedy Dry" and later cat-box litter to absorb the fluid from the deck. They also attempted to slow the leaks by tying rags around the fittings connecting the hoses to the vibratory hammer. Several of the workers on the site complained about the slippery conditions on the barge's deck to the foreman and the union steward. Some of the workers also claimed to have told defendant's general superintendent, Ed Brush, about this situation. Mr. Brush, however, denied any knowledge of the complaints or the hazard. Other than the remedial measures taken by the workers on the supply barge, no repairs were made. Consequently, the deck of the supply barge remained very slippery for the week or so leading up to the accident.

On September 30, 1988, plaintiff was working on the Jamestown Bridge project as a tag man. He was positioned on the supply barge with his tag line. As a result of the crane's jerkey motions, a great deal of tension was put on his tag line. As plaintiff attempted to steady the hammer, he walked down the length of the supply barge. When walking across the portion of the deck covered with hydraulic fluid, plaintiff slipped, lost his balance, and was dragged by his tag line until he hit the power pack. Plaintiff sustained back injuries in this incident which he claims to be permanent. Defendant received workers' compensation from defendant or its insurer for the injury and continued to receive those benefits as of the date of the trial.

In addition, plaintiff filed suit against defendant under the Jones Act and the LHWCA. The case originally went to trial

before Judge Torres sitting with a jury. The jury found for the plaintiff on the Jones Act claim and awarded him money damages. Since the Jones Act and the LHWCA provide mutually exclusive remedies, the jury, in accordance with the instructions of the trial judge, did not reach the LHWCA claim. That verdict was reversed by the full panel of the First Circuit, which determined that plaintiff's claim did not fall within the Jones Act. *DiGiovanni v. Traylor Bros.*, 959 F.2d 1119, 1123-24 (1st Cir. 1992) (en banc) *cert. denied* __ U.S. __, 113 S.Ct. 87 (1992) The case was ultimately remanded to this Court for trial on the LHWCA claim. After a hearing on February 10, 1993, the Court determined that the case was now a non-jury matter. Later, defendant made a motion for summary judgment which was denied on September 8, 1993. *Digiovanni v. Traylor Bros.*, 830 F.Supp. 106 (D.R.I. 1993). The case was retried before the Court sitting without a jury commencing on October 20, 1993 for three days. The matter was then taken under advisement. It is now in order for decision.

EMPLOYERS AND VESSEL OWNERS

In analyzing whether defendant is liable in this case, the Court must take care to differentiate between an employer and a vessel owner. The LHWCA was enacted in 1927 to provide compensation for maritime workers injured on the job. *See Director, Office of Workers' Compensation Programs v. Perini N. River Assocs.*, 459 U.S. 297, 306 (1983). The Act filled a gap left by several Supreme Court decisions limiting the jurisdiction of state workers' compensation laws. *See id.* at 306-7. The Act is similar to state workers' compensation schemes in that common law tort liability is replaced by a no-fault compensation system for workers injured in the course of employment. *Compare* 33 U.S.C. § 904-5 *with* R.I. Gen. Laws § 28-29-20. The statute contains a limited exception, however, which allows

an individual covered by the Act, who is injured by the negligence of a vessel, to sue the vessel.[1] *Id.* § 905(b). It is to be noted that it can be a great waste of time and effort for an injured worker receiving workers' compensation benefits to sue the vessel owner for negligence. By winning that case he may gain nothing. Before he receives any money from the judgment, the employer, or its compensation carrier, must be reimbursed for any benefits received or any future benefits to be received. On top of that, the employee must cover his litigation expenses. 33 U.S.C. § 933; *Jones & Laughlin Steel Corp. v. Pfeifer* 462 U.S. 523, 530 n. 5 (1983) ("The longshoreman cannot receive a double recovery, because the stevedore, by paying him statutory compensation, acquires a lien in that amount against any recovery the longshoreman may obtain from the Vessel."); *Peters v. North River Ins. Corp.*, 764 F.2d 306, 311-12 (5th Cir. 1985); *Johnson v. Sioux City & New Orleans Barge Lines, Inc.*, 629 F.2d 1244, 1245-46 (7th Cir. 1980).

In the present case, defendant was both plaintiff's employer and the owner of the vessel upon which he was injured. The Supreme Court has noted that even when the employer is the vessel owner, the Act still affords a remedy. *Pfeifer* 462 U.S. at 530 ("[A] separate action is authorized against the vessel even when there is no independent stevedore and the longshoreman is employed directly by the vessel owner.[2]") The LHWCA

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1. As originally enacted, the Act allowed an injured worker to sue a vessel owner under the "unseaworthiness doctrine." It held the vessel owner strictly liable for injuries caused by the vessel. The doctrine was replaced by the vessel negligence provisions codified in 33 U.S.C. § 905(b). H.R. Rep. No. 1441, 92nd Cong., 2d Sess. 118, *reprinted in* 1972 U.S.C.C.A.N. 4698, 4701-2.

2. Several Supreme Court decisions concerning the LHWCA have dealt

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immunizes defendant from tort liability in its capacity as the employing contractor. 33 U.S.C. § 905(a). In its capacity as vessel owner, defendant may be sued for the negligence of the vessel only. 33 U.S.C. § 905(b). The Supreme Court stated *Pfeifer,* "[A] vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its 'stevedore' capacity." 462 U.S. at 531 n.6. This Court, therefore, must treat the defendant as two separate and distinct entities: defendant as the *owner* of the Betty F and the supply barge and defendant as the *contractor* who hired plaintiff to work on the Jamestown Bridge project.

This legal distinction may seem inequitable in that it allows a vessel owner to be a negligent employer and escape liability except for workers' compensation benefits. However, this apparent inequity may be quickly dismissed when it is remembered that immunity is the rule while vessel owner liability is the exception. *Levene v. Pintail Enterprises,* 943 F.2d 528, 531 (5th Cir. 1991). To merge the two capacities, permitting liability of the employer to be visited upon the vessel owner, would allow the exception to swallow the rule in clear violation of the intent of Congress. *See Castorina v. Lykes Bros. S.S. Co.,* 758 F.2d 1025, 1033 (5th Cir. 1985).

VESSEL NEGLIGENCE

The 1972 amendments to the LHWCA replaced liability based on unseaworthiness with liability based on vessel

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specifically with longshoremen and stevedores. The principles in those decisions are applicable to all maritime employers and employees covered by the Act. *Hill v. Texaco, Inc.,* 674 F.2d 447, 451 (5th Cir. 1982); *Cook v. Exxon Shipping Co.,* 762 F.2d 750, 752 (9th Cir. 1985).

negligence. The amendments, however, provided no guidance as to the extent of this new vessel negligence action. Consequently, courts were left to devise the standards. A split in the circuits developed that was finally resolved in *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156, 162 n. 9 (1981).

In *Scindia,* the Supreme Court set forth three ways by which a vessel owner could be held negligent. The first might be called breach of the "turn-over duty". A duty is imposed on the vessel owner to warn the stevedore about any hidden defects which the owner knew or should have known through the exercise of reasonable care at "turn-over" time. *Id.* at 166-67. Once the vessel has been entrusted to the stevedore, the shipowner, "has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore." *Id.* at 172.

The second course of action for vessel negligence recognized in *Scindia* arises where the shipowner has violated the duty to exercise due care to avoid exposing longshoremen to harm from hazards under the active control of the vessel. *Id.* at 167.

The third theory of vessel negligence posited in *Scindia* is based on the duty of the vessel owner to intervene and take reasonable steps to eliminate a hazard if he has actual knowledge that a condition of the vessel or its equipment poses an unreasonable risk of harm *and* the owner acquires knowledge that the stevedore, in the exercise of obviously improvident judgment, means to work on in the face of it and thus cannot be relied on to remedy it. *Id.* at 175-6; *Levene* 943 F.2d at 533.

Appendix F

Unless an injured worker proves vessel negligence in one of these three ways, the vessel owner is not subject to liability. *See Masinter v. Tenneco Oil Co.*, 867 F.2d 892, 896-97 (5th Cir. 1989).

It is clear from the testimony presented at trial in the present case that the fluid spill was an open and obvious hazard known for some period of time by all those working in the area. Since this hazard was not hidden, the first *Scindia* duty, the "turn-over" duty, has not been violated by defendant as owner in this case.

Plaintiff also cannot recover under the second theory of negligence set forth in *Scindia*. In order to recover under that approach, plaintiff must show harm from a hazard under the active control of the vessel. In this case, the power pack was not part of the equipment of the vessel. It was placed on the barge by defendant to facilitate its work as a contractor. The machinery was serviced by employees of the defendant as contractor not vessel owner. Furthermore, any spill clean up was the responsibility of employees of the contractor. It cannot be concluded here that the hazard was under control of defendant as a vessel owner in any way.

At the center of the third theory of vessel negligence under *Scindia* is the relationship between the vessel owner and the employer. The Supreme Court noted,

> As we have indicated, the legal duties placed on the stevedore and the vessel's justifiable expectations that those duties will be performed are relevant in determining whether the shipowner has breached its duty.

> The trial court, and where appropriate the jury, should thus be made aware of the scope of the stevedore's duty under positive law. But an equally necessary inquiry is whether the pertinent statutes, regulations, or custom place or assume a continuing duty on the vessel to repair defective ship's gear being used by the stevedore in the cargo operation.

4541 US at 176. The Fifth Circuit Court of Appeals has refined the criteria for the duty to intervene,

> *Scindia,* therefore, requires the existence of two basic conditions for the imposition of the shipowner's duty to intervene — the shipowner's actual knowledge of a danger to a longshoreman, and the shipowner's knowledge that the longshoreman's employer is not acting reasonably to protect its employees from that danger. The *Futo*[3] court outlined considerations that pertain to the existence of these basic conditions: whether the danger was pen and obvious; whether the danger was located within the ship or ship's gear; which party created the danger or used the defective item and was therefore in a better position to correct it; which party owned and controlled the defective item; whether an affirmative act of negligence or acquiescence in the use of the dangerous item

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3. *Futo v. Lykes Bros. S.S. Co.,* 742 F.2d 209 (5th Cir. 1984).

> occured; and whether the shipowner assumed any duty with regard to the dangerous item.

Casaceli v. Martech Int'l, Inc. 774 F.2d 1322, 1328 (5th Cir. 1985) (citations omitted); *accord Roach v. M/V Aqua Grace,* 857 F.2d 1575, 1582 (11th Cir. 1988). The Fifth Circuit has specifically declined to adopt the narrower approach of the Third and Ninth Circuits. *Williams v. M/V Sonora,* 985 F.2d 808, 810, 812-13 (5th Cir. 1993). Those courts require that in order for the duty to intervene to arise, some part of the vessel or its gear must have caused the injury at issue. *Carpenter v. Universal Star Shipping, S.A.,* 924 F.2d 1539, 1542-43 (9th Cir. 1991); *see Derr v. Kawasaki Kisen K.K.,* 835 F.2d 490, 496 (3rd Cir. 1987). Rather than focusing solely on the istrumentality of the injury, this Court prefers the flexible approach of the Fifth Circuit which allows a court to examine all of the circumstances surrounding an injury including the relationship between the vessel owner and the employer. *See Futo v. Lykes Bros. S.S. Co.,* 742 F.2d 209, 215-18 (5th Cir. 1984). Accordingly, the Court adopts the approach of the Fifth Circuit to determine whether the vessel owner here had a duty to intervene.

The considerations expressed in *Casaceli* point away from a duty to intervene on the vessel owner in this case. The instrumentality causing the injury was operated by the contractor. The contractor had taken the responsibility to maintain the power pack by hiring mechanics to care for all of the machinery. The contractor was in a better position to appreciate the problem since it used the power pack every day. Furthermore, the hazard was open and obvious to the workers, so no warning was required. The *sole* extent of the vessel's involvement in this case was that it served as a situs for the incident. Clearly, the negligence in this case was the employer's not the vessel's. In

enacting the 1972 amendments Congress did not intend for a vessel to be held responsible for the employer's negligence. H.R. Rep No. 1441, 92d Cong., 2d Sess. 118, *reprinted in* 1972 U.S.C.C.A.N. 4698, 4703-4. Accordingly, this Court concludes that defendant as vessel owner in this case had no duty to intervene.[4]

In addition, plaintiff failed to prove that defendant, in its capacity as vessel owner, actually knew of the contractor's unreasonableness in ignoring the hazard of fluid on the deck of the supply barge.

At trial, several members of the work crew claimed that they told Brush about the problem. In his deposition, which was introduced as evidence, Brush denied any knowledge of the fluid hazard or complaints about it. He was the general superintendent of the Jamestown Bridge project. He was in charge of marshalling and assigning the labor force for the various phases of the bridge building project. Brush reported directly to the project manager.

Assuming that Brush knew about the fluid hazard, that knowledge cannot be attributed to defendant as vessel owner. Brush was clearly working within the construction division of defendant's organization. His duties had nothing to do with the vessel's ownership. Plaintiff failed to prove that any member of defendant's management team, as vessel owner, actually knew of the hazard and the contractor's failure to correct it through those responsible for the construction work on the bridge.

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4. Even had the Court adopted the approach of the Ninth and Third Circuits, no duty would have arisen because the injury was caused by the contractor's equipment and not the ship's gear.

In short, plaintiff has simply failed to prove any vessel negligence in this case.

CONCLUSION

Since plaintiff has failed to prove that defendant was negligent in its capacity as vessel owner, plaintiff cannot recover damages in this case. He will have to be content with collecting his workers' compensation benefits.

Accordingly, the Clerk will enter judgment for the defendant forthwith.

It is so ordered.

s/ Ronald R. Lagueux
Ronald R. Lagueux
Chief Judge
June 9, 1994

APPENDIX G — OPINION EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED MARCH 4, 1992 IN *DIGIOVANNI, JR. V. TRAYLOR BROTHERS, INC.*

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1951

ROCCO P. DIGIOVANNI, JR.,

APPELLEE,

TRAYLOR BROTHERS, INC.,

APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Hon. Ernest C. Torres, *U.S. District Judge*]

Before

Breyer, *Chief Judge,*
Aldrich, *Senior Circuit Judge,*
Campbell, *Circuit Judge,*
Bownes, *Senior Circuit Judge,*
Torruella, Selya and Cyr, *Circuit Judges.*

Andrew Rothschild with whom *Eric D. Paulsrud, John D. Husmann,* and *Lewis, Rice & Fingersh* were on brief for appellant.

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David B. Kaplan with whom *Thomas M. Bond, The Kaplan/ Bond Croup, Paul Gallogly,* and *Lovett, Schefrin, Callogly & Harnett* were on brief for appellee.

March 4, 1992

OPINION EN BANC

ALDRICH, *Senior Circuit Judge.* Defendant petitions for rehearing on the single issue of Jones Act recovery, renewing its claim that plaintiff, a member of the carpenter's union, is not a seaman, and the barge, the BETTY F, was not to be regarded as a vessel, particularly in light of a number of recent cases, notably in the Fifth Circuit. It asks us to reconsider our holding in *Bennett v. Perini Corp.,* 510 F.2d 114 (1st Cir. 1975). Defendant asserts that, by speaking in terms of vessels, we have extended the concept of special protection needed for seamen exposed to the perils of the sea to workers who are not even theoretically so endangered. This, allegedly, is a carry-over of outmoded Supreme Court decisions, *post.* We will reconsider.

Briefly, the facts are these. The BETTY F was a barge, 100 feet in length, with a 40 foot beam and a raked bow and stern, and with nautical equipment, such as navigation and anchor lights. In all respects it met the commonly understood characteristics of a vessel, and, indeed, was inspected by the Coast Guard. It had no means of self-propulsion, except that positional movement could be achieved by manipulating its spud anchors. Its current use was to float at the Newport, Rhode Island, bridge, bearing a crane that was being used for bridge construction. Its permanent station was Davisville, Rhode Island, from which it was towed, by a tug, from time to time, to perform various shore jobs. It had been at the Newport bridge for a month.

It was positioned about the bridge, and moved away from the pilings at night, to prevent damage.

Plaintiff's principal duty was to handle a tag line to guide the crane, but he also did maintenance work, such as painting, and tended lines. Although he was attached to the BETTY F, at the time of his injury he was standing on the deck of a supply barge in order better to manipulate the line. Its deck proved to be slippery, and he fell. The supply barge was in general use to *carry supplies,* but also served as a work platform.

The district court put special questions to the jury as between plaintiff being a Jones Act seaman and a harbor worker, and stated it could find the former — with greater rights — if he was attached to a vessel. Following *Bennett,* it stated, "A special purpose structure not usually employed as a means of transport by water, but designed to float on water may also be considered a vessel," and said nothing about its current use. The jury answered that plaintiff was a seaman, and defendant, having duly saved its rights, appealed. A panel, unanimous because it felt bound by *Bennett,* affirmed. This petition followed.

The Jones Act itself, 46 U.S.C. § 688, does not use the words ship and vessel, and speaks only of seamen, but courts have naturally spoken of seamen in terms of ships, vessels, and voyages. Thus in the recent case of *McDermott International, Inc. v. Wilander,* 111 S. Ct. 807, 814 (1991), the Court repeated the definition given in *Warner v. Goltra,* 293 U.S. 155 (1934), "a seaman is a mariner of any degree, one who lives his life upon the sea. It is enough that what he does affects 'the operation and welfare of the ship when she is upon a voyage.' " *Warner,* 293 U.S. at 157 (citing *The Buena Ventura,* 243 F. 797, 799 (S.D.N.Y. 1916)); *see also, Norton v. Warner Co.,* 321 U.S. 565, 572 (1944).

And, of course, a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside. *See Powers v. Bethlehem Steel Corp.*, 477 F.2d 643, 648 (1st Cir.), *cert. denied*, 414 U.S. 8S6 (1973). This practical fact availed the Court to hold that stevedores substituting for seamen in doing conventional seamen's work when the vessel was docked should equally come under the Act. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). The reasoning was that the stevedore was "incurring a seaman's hazards." *Id.* at 99. In point of fact this could be said to be making the exception the rule. Seamen who go down to the sea in ships incur special hazards on the sea, not at dockside.[1] The reasoning that favors not interrupting their coverage during a temporary cessation of those risks does not equally favor opening the coverage to workers who substitute for seamen only during non-hazardous, non-voyage, intervals. This, however, was once law.[2] The battle between the Court and Congress, met by revisions in the Longshore and Harbor Workers' Compensation Act (LHWCA), 44 Stat. (part 2) 1424, as amended, 33 U.S.C. §§ 901-950, detailed in *Wilander*, 111 S. Ct. at 810-13, was won by Congress. Longshoreman and seaman

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1. Because *Wilander* has now quoted it with approval, we repeat Chief Justice Stone's dissent in *Sieracki*. "Seamen are in some sort co-adventurers pon the voyage; and lose their wages upon casualties, which do not affect artisans at home. They share the fate of the ship in cases of shipwreck and capture. They are liable to different rules and sufferings from landsmen." 328 U.S. at 105 (citing *Reed v. Canfield*, 20 F. Cas. 426, 428 (C.C.D. Mass. 1832)).

2. One member of this panel still recalls *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963), where we were reversed for denying the warranty of seaworthiness to a longshoreman who never set foot on the ship, but who was injured on the dock by unloaded cargo that had been improperly packaged; a defect held to make the ship unseaworthy, to plaintiff's benefit. Justice Harlan dissented. *Gutierrez is* now flotsam.

status are now mutually exclusive. 111 S. Ct. at 817. *"All who work at sea* in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed." *Id.* (emphasis supplied). We followed that concept to a considerable extent in *Powers,* 477 F.2d 643 (1st Cir. 1973), *ante,* but we did so in terms of whether the structure was a vessel. The structure on which plaintiff was working was a raft, made of 12 x 12 timbers bonded together, used as a floating platform for pile workers and carrying sandblasting equipment and forms under piers to be placed around piles. We held it was not a vessel in spite of "occasional 'voyages' — when towed by workboat from one pier to another." [3] *Id.* at 647.

> Rafts, of course, may be designed or used 'to encounter perils of navigation . . . . But we cannot reasonably describe the present raft as other than a floating stage. Even with men and equipment on it, its *movement,* amounting mostly to a positioning under the pier *incidental to its intended use, was not navigation.*

Id. (emphasis supplied). Later in the opinion, we remarked that "the law of admiralty [is] 'designed and molded to handle problems of vessels relegated to ply the waterways of the world,' " *id.* at 648 (citing *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 269 (1972)). Two years thereafter, however, we moved a long way from a waterway, holding that a pier worker who fell from a pier onto another land-based

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3. "It had . . . also been towed through Boston harbor to other jobs." 477 F.2d at 645.

platform could it recover under the Jones Act because the barge on which he also worked, Scow 101, could be found to be a vessel. *Bennett v. Perini Corp.*, 510 F.2d 114 (1st Cir. 1975). In a comparatively brief discussion, we distinguished *Powers*, saying that Scow 101's

> seagoing range and versatility are greater . . . .To be a vessel, the purpose and business must *to some reasonable degree be the 'transportation* of passengers, cargo, or equipment from place to place across navigable waters.' *Powers* at 477 F.2d 647. A *major function* of Scow 101 *appears to have been the transportation* of the structural materials and tools used to build the bridge and the crane across the navigable waters of Narragansett Bay.

510 F.2d at 116 (emphasis supplied).

Having determined that because of its "major function" of transportation, the scow was a vessel, the *Bennett* court faced the question whether plaintiff " 'contributed to the function . . . or to the accomplishment of its mission.' " *Id.* (quoting *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959)). We noted that, as a carpenter, plaintiff spent much of his time on the pier. However,

> there was evidence that a major part of the carpentry work was regularly done on the deck of Scow 101, where the additional space provided a necessary platform for constructing and reworking the panels.

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* * * *

> [T]he 'mission' of Scow 101 was to provide a support base for the construction of the bridge piers. Appellant's duties, if not obviously maritime, related to that function and were arguably essential for its satisfactory performance.

510 F.2d at 117. Thus while *Powers'* raft's transportation of sandblasting equipment from pier to pier, and "through Boston Harbor to other jobs," was "incidental," to its "intended use," Scow 101's transportation of a crane across Narraganset Bay was "to some reasonable degree" a "major function," and made the pier worker a seaman.

This produced a difficult dividing line. It is particularly troublesome in light of the fact that plaintiff Bennett was not a user of the crane, and thus connected with what was transported, but was simply using the floating deck space, comparable to the *Powers* raft, which this court described as "an extension of the pier, itself an extension of the land." 477 F.2d at 648. Nor, if transportation — the voyage — is the key to maritime responsibility, did the *Bennett* court make any mention of the length of jobs, and consequent voyage frequency. What we did was quote the amorphous wording of the *Offshore Company* opinion, "The 'injured workman [can go to the jury if he] was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water).' " 510 F.2d at 115 (quoting *Offshore,* 266 F.2d at 779), rather than the language of *Powers* stressing "special purpose floating structures whose function requires exposure to the hazards of the sea." 477 F.2d at 647.

This language from *Offshore* did not survive. Many decisions later, in *Bernard v. Binnings Construction Co.*, 741 F.2d 824 (5th Cir. 1984), *Offshore* was relegated to a footnote. Floating is not enough. *Id.* at 828 n.13. Nor is "capability of movement across navigable waters." *Id.* at 829. Rather, the test is whether it

> was designed[4] or used primarily for the transportation of cargo, equipment or persons across navigable waters or was, at the time of Bernard's injuries, engaged in navigation.

Id. The court also noted

> that a structure whose purpose or primary business is *not* navigation or commerce across navigable waters may nonetheless satisfy the Jones Act's vessel requirement if, at the time of the worker's injury, the structure was actually in navigation.

Id. (emphasis in original).

This standard, as applied in a number of other Fifth Circuit cases,[5] looking to use, rather than simply to the physical

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4. Even this word was uncalled for. Current use, not previous purpose, should be the test. *Ducrepont v. Baton Rouge Marine Enters., Inc.*, 877 F.2d 393, 396 (5th Cir. 1989).

5. *E.g.*, *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 293 (5th Cir. 1990); *see also Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504 (11th Cir. 1990).

characteristics of the structure, does appear a reasonable resolution of Jones Act principles as against mere definitions of vessels to convert longshoremen into seamen. A worker becomes a seaman not by reason of the physical characteristics of the structure to which he is attached, but because its being operational "in navigation" exposes him to "a seaman's hazards." He is not exposed by what the vessel did in the past, or by its future potential, and to give him these special benefits by mechanical definitions without the exposure is misplaced generosity as in *Gutierrez*, n.2, *ante*. Just as we relied on *Offshore* in the past, we believe we should now accept the Fifth Circuit's improved version. In sum, if a barge, or other float's "purpose or primary business is not navigation or commerce," then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit.

That there should be a varying status designation depending on the activity at the moment is not a novel concept. In *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971), a longshoreman who, because unloading, would have had unseaworthiness recovery under the Jones Act, per *Gutierrez*, for a ship-caused injury, was injured instead using the stevedore's equipment. Recovery was not allowed. We believe our division of responsibility to the activity equally appropriate.

Our rule is also in entire accord with *Wilander's*, language quoted in the second paragraph of this opinion and in n.1, *ante*. In holding that every member of the ship's complement comes within the Jones Act, *Wilander* referred to the "voyage," and "vessels in navigation." It spoke not in terms of the ship, but of "[a]ll who work at sea in the service of a ship [and] face those particular perils to which the protection of maritime law, statutory as well as decisional, is based." 111 S. Ct. at 817.

Again, more recently in *Southwest Marine, Inc. v. Gizoni,* 112 S. Ct. 486, 494 (1991), where the plaintiff was working on a floating platform, the Court referred to the opinion below, saying,

> The Ninth Circuit concluded that questions of fact existed regarding whether the floating platforms were *vessels in navigation,* and whether Gizoni had sufficient connection to the platform to qualify for seaman status.

(Emphasis supplied.) What is particularly interesting is the record which the Court held presented a jury question on each of these issues. It appeared from the opinion below, *Gizoni v. Southwest Marine, Inc.,* 909 F.2d 385 (9th Cir. 1990), that defendant was a ship repairer who used floating platforms to support the workmen, and to carry materials and equipment. Plaintiff was on such a platform engaged in transporting a rudder to a ship when his foot went through the deck. Although plaintiff was a rigging foreman, his duties included handling lines, and he occasionally served as a lookout and gave maneuvering signals to the tugboat operator. 909 F.2d at 387. The platform, in other words, at the time of plaintiff's injury, was engaged in transportation, and plaintiff was a participant in that operation.

Under our rule we would be more favorable to the worker than was the *Gizoni* Court, if its language as to there being an issue of fact be regarded as a ruling. Clearly we would have felt the worker within the exception even if, during actual repair work to a floating ship, there was no navigation or commerce. But what is even more clear is that the present plaintiff does not measure up to *Gizoni.* The BETTY F had transported nothing for a month since it left defendant's headquarters in Davisville.

Since then it was simply moved about the piers for working convenience, and at night for safety. This was hardly navigation or commerce, and did not diminish the primary nature of the platform's shore use and purpose. *See Ellender v. Kiva Construction & Engineering, Inc.*, 909 F.2d 803, 807 (5th Cir. 1990). Correspondingly, that plaintiff occasionally adjusted lines for pier movement and the rise and fall of the tides, did not expose him to the risks of a voyage.

There is a suggestion that the supply barge, on which plaintiff was injured, was operating as a vessel. This barge was in general use, and was not "attached" to the BETTY F, and plaintiff was not "assigned permanently" thereto. *Bennett*, 510 F.2d at 116. Nor did he use it except as a work platform. Whether plaintiff is to be considered a seaman must depend upon the BETTY F.

A final word. Our denying Jones Act recovery does not end this case. The court put alternate questions to the jury; posing simple negligence under the LHWCA if the jury did not answer the Jones Act questions favorably. Since it did answer favorably, it did not answer the alternate negligence questions. In all fairness, there should be a new trial, with that heavier burden.

Reversed and remanded for further proceedings consistent herewith.

Dissent follows.

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TORRUELLA, *Circuit Judge,* with whom BOWNES, *Senior Circuit Judge,* joins (Dissenting). William Shakespeare tells us in a famous passage from *Romeo and Juliet* that labels are not important, but rather that content is what counts.[6] In more recent times, Gertrude Stein had similar advice.[7] Although poetic philosophy seems far removed from the hard world of maritime torts, I believe that the counsel found in those quotations has definite relevance to the issue that separates my views from those of my colleagues in the majority.

Notwithstanding the lack of a statutory definition for the term "vessel" in the Jones Act, 46 U.S.C. § 688,[8] at least twenty-seven (27) federal maritime or maritime related laws[9] define "vessel" in such manner as to clearly include the BETTY F within the scope of their description. The BETTY F is thus a "vessel" under the Shipping Act, 46 U.S.C. § 2101(45), and the Merchant Marine Act, 46 U.S.C. § 801. It is covered as such by

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6. "What's in a name? That which we call a rose By any other name would smell as sweet."

Shakespeare, William, *Romeo and Juliet. II.* ii, 43.

7. "Rose is a rose is a rose is a rose." Stein, Gertrude, *Sacred Emily* (1913).

8. 46 U.S.C. § 688:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury.

9. *See* Appendix to this opinion.

the International and Inland Rules of the Road, 33 U.S.C. §§ 1601(1), 2003(a), can be mortgaged under the Federal Ship Mortgage Insurance Act, 46 U.S.C. § 1271(b), must have its bottom painted within the restrictions of the Antifouling Paint Control Act, 33 U.S.C. § 2401(11), and even falls within the definition found in the Sentencing Guidelines Act, 18 U.S.C. § 3615. In contrast, I have found no federal maritime statute which would label the BETTY F anything other than a vessel. It would seem that the weight of these Congressional pronouncements alone would be enough to sustain appellee's case if for no other reason than by its recognition of the time honored doctrine of *in pari materia. See McDermott Int'l, Inc. v. Wilander,* 111 S. Ct. 807, 811 (1991); *Morissette v. United States,* 242 U.S. 246, 263 (1952); *United States v. Porter,* 591 F.2d 1048, 1053 (5th Cir. 1979).

Because "[t]he inquiry into seaman status is of necessity fact specific: it will depend on the nature of the vessel, and the employee's precise relation to it," *Southwest Marine, Inc. v. Gizzoni,* __ S. Ct. __ (1991); *McDermott Int'l, Inc. v. Wilander,* 111 S. Ct. at 818. I believe that it is useful to spell the facts out in somewhat greater detail than is done in the majority opinion.

THE FACTS

Appellee was injured aboard a supply barge while tending tag lines to a crane aboard the barge to which he was assigned, the BETTY F. These two barges worked together with the supply barge not only carrying supplies to be used aboard the BETTY F, but more significantly, transporting part of BETTY F's crane at the time of the accident.

The BETTY F is a typical steel-hulled barge designed to

transport cargo or act as a work platform. It is 100 feet in length overall, has a 40 foot beam, raked bows and stern, and carries a roll-on crane in its aft area. It has toilet facilities for the crew, and what amounts to a galley in the form of an enclosed cafeteria with a stove and refrigerator, where the crew regularly take their meals. A tool shack and a sitting area are located in its bow section. The evidence presented at trial established that this vessel is routinely inspected by the Coast Guard for compliance with its regulations, as well as by surveyors for marine insurance purposes. Sea trials are also conducted to determine its seaworthiness and insurability.

As part of its compliance with Coast Guard requirements, the BETTY F had port and starboard navigation lights which were used when the barge was moved at night. It also carried and used anchor signals when not in movement, white balls which are hoisted when working at anchor in day time and a white anchor light and whistle for working at night. As required by regulations, its name and home port, "Wilmington, Delaware," are painted on its stern. Pilsom marks, indicating its load lines, are painted on its sides as is normally the case with other vessels. By observing these markings, the BETTY F's ballast is periodically shifted, thus maintaining a seaworthy trim. The BETTY F was frequently boarded and inspected by the Coast Guard pursuant to its legal duty to see that vessels are in compliance with the maritime laws of the United States. *See* 14 U.S.C. § 2; *Dougherty v. Santa Fe Marine Inc.*, 698 F.2d 232 (5th Cir. 1983) (Failure to follow any Coast Guard regulation which is cause of an injury establishes negligence per se).

The BETTY F was based in Davisville, Rhode Island, from where it was towed by a tug to its venous work locations, including its workplace at the time of appellee's injury, a bridge

under construction in Jamestown, Rhode Island. The tug moved the BETTY F "to whatever area we were going to." It was "moved quite a bit." In August, the month before appellee's accident, the BETTY F had been outfitted in Davisville. Although a tug was used to move the BETTY F most of the time, it also had four spud anchors which could be used to reposition the barge once on location. At the location in question, the BETTY F was moved away from the bridge's pilings every night to prevent damage by the tidal surge.

Appellee, as well as the rest of the BETTY F's crew, were transported to work each day from Davisville by a crew boat. Although appellee's principal duties on the BETTY F were as a ragman for the crane, his work also included typical able seaman's duties aboard a steel vessel: chipping, painting and providing basic maintenance to the hull, tending mooring lines, rendering the vessel setting and resetting the anchors moving the barge away from the bridge every night and ballasting the hull. When moved by the tug, the BETTY F's crew, including appellee, worked together with the tug's crew and under the tug captain's orders. In fact, many times appellee would actually be physically aboard the tug during these operations.

As previously indicated, appellee was working on the supply barge when he was injured. This barge is an integral part of the BETTY F's operation, and has no separate name or identification. It is 80 feet in length and has a 40 foot beam. Towed by a tug, it traveled back and forth on an almost daily basis from its main base in Davisville, bringing materials and equipment to the BETTY F.

The record contains additional information, which although admittedly less relevant, adds a definite maritime flavor to the

activities aboard the BETTY F. At least part of the BETTY F's crew was composed of former merchant seamen. The crew wore life jackets while working aboard the BETTY F. The *lingua franca* of the crew/witnesses with reference to the BETTY F is seaborn in nature, i.e., "crew," "aboard," "load lines," "ballast," "anchors," "bow," "stern," "forward," "aft," "alongside," "midships," "deck" and "ashore." This terminology is found throughout the record. Although it might be argued that this is stretching a self-serving argument, I point out that this language was not only used by appellee's witnesses but also by appellant's attorney throughout the trial, and his expert witness, Davis C. Du Bois, who at all times during his testimony referred to the BETTY F as a "vessel." I suggest that this conduct reflects an acceptance by appellant of an undeniable reality, at a time when the status of the BETTY F as a vessel was taken for granted.[10] In fact, all who dealt with the BETTY F, the Coast Guard, its crew, its owners, that is, all except this Court, treated the BETTY F as if it were a vessel, not something else. Lest we forget, no one argues that the BETTY F is physically or structurally any different than the thousands of similar barges which ply the oceans of the world or that the BETTY F is incapable of engaging in such commerce. Rather, the downgrading of the BETTY F to non-vessel status seems to be anchored on the frequency, or more accurately, the infrequency, of its voyaging.

DISCUSSION

In my opinion the majority's change in course fails to take into account the Supreme Court's traditionally liberal construction in deciding who is a "seaman" under the Jones Act.

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10. I might add, only in half jest, that people usually do not name non-vessels. This seems to indicate that the BETTY F's owners considered it enough of a "vessel" to treat it in a traditional vessel fashion.

See Cox v. Roth, 348 U.S. 207, 210 (1954). We find the most recent expression of this unswerving trend in the Court's unanimous decisions in *Southwest Marine, Inc. v. Gizzoni, supra,* and *McDermott Int'l Inc. v. Wilander,* 111 S. Ct. at 814 ("[t]he Jones Act is a remedial statute").

In *Wilander,* Justice O'Connor clearly forecasts the outcome of our present case in her discussion of the need for the concept of a "vessel" to evolve with changing technology. *Wilander,* 111 S. Ct. at 812. Also of prime importance to the present controversy is the Court's citation, with apparent approval, of *Offshore Co. v. Robinson,* 266 F.2d 769 (5th Cir. 1959), from which we adopted the rule in *Bennett v. Perini Corp.,* 510 F.2d 114 (1st Cir. 1975), which the majority now discards. *Id.* at 809. The "seaman" in *Wilander,* was a paint foreman whose duties "consisted primarily of supervising the sandblasting and painting of various fixtures and piping located on oil drilling platforms." *Wilander,* 111 S. Ct. at 809. *Wilander was injured on one such platform.* At the time, he was assigned to a "paint boat" that contained equipment used in sandblasting and painting the platforms. *The drilling platforms were attached to the ocean floor* in a semi-permanent manner.

The facts in Gizzoni sound equally familiar. Several floating work platforms were also involved, including a pontoon barge, two float barges, a rail barge, a diver's barge, and a *crane barge. Gizzoni,* 60 U.S.L.W. at 4021. Gizzoni was a rigging foreman on these working platforms and rode them as they were towed into place. The platforms were used to move equipment and supplies *around a shipyard and on and off vessels under repair.* These platforms had no power, means of steering, navigation lights, navigating aids or living facilities. They were moved by tugs, which positioned them as needed. Gizzoni occasionally

served as lookout and handled lines from the crew. He was injured while on a platform being used to transport a rudder *from the shipyard to a floating drydock in that yard.*

In *Wilander* the Court said that the issue of who is a "seaman" under the Jones Act [i.e., an employee who contributes to the functions or mission of a vessel], is better characterized as a mixed question of law and fact than as a pure question of fact for the jury. *Wilander,* 111 S. Ct. at 818. But if there are questions of fact "regarding whether the floating platforms were vessels in navigation," these must be submitted to the jury. *Cizzoni,* 60 U.S.L.W. at 4023. However, if "underlying facts are established, and the rule of law is undisputed, the issue is whether the facts meet the statutory standard." *Wilander,* 111 S. Ct. at 818. "[S]ummary judgment as a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *Id.*

As I understand appellant's position, particularly considering the record before the district court, the facts as stated *ante* are not substantially in dispute. *See* Appellant's Brief at 3-7; Petition for Rehearing, at 4. Appellant did not present any evidence challenging appellee's witnesses and the facts dealing with the BETTY F. To this we must add that the BETTY F and the supply barge (and perhaps the crew boat) are a "group of vessels" *(see Gizzoni,* 60 U.S.L.W. at 4021). Although I believe that as a matter of law it could be ruled that appellee was injured while working on a "vessel," I am willing for present purposes, to concede that it is still arguably a jury question. *Id.* We thus look to the new legal standard established by the majority.

Under *Bennett v. Perini Corp.,* 510 F.2d 114, 116 (1st Cir. 1975), relied upon by both the district court and the panel:

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> To be a vessel, *the purpose* and business must *to some reasonable degree* be the "transportation of passengers, cargo or equipment from place to place across navigable waters."

(Emphasis supplied).

The Fifth Circuit's "standard," which is purportedly adopted by the *en banc* majority in place of *Bennett, is* found in *Bernard v. Binnings Construction Co.*, 741 F.2d 824, 829 (5th Cir. 1984). In reality the Fifth Circuit sets two different standards:

> a. The first: "[A] structure whose purpose or primary business is not navigation or commerce across navigable waters may nonetheless satisfy Jones Act's vessel requirement if, at the time of the worker's injury, the structure was *actually* engaged in navigation."

Id. (Emphasis in the original).

> b. The second: A Jones Act "vessel" is a structure which "*was designed* or used primarily for the transportation of cargo, equipment or persons across navigable waters OR was, at the time of [the] injuries, engaged in navigation."

Id. (Emphasis and capitals supplied.)

Thus, according to the Fifth Circuit a structure *not designed* for transportation must be in *actual navigation* to be a vessel. *See also Cook v. Belden Concrete Products*, 472 F.2d 999, 1002 (5th Cir. 1973), *cert. denied*, 414 U.S. 868 (1973). If it is *designed* for transportation it does *not* necessarily have to be in

actual navigation. I think it relevant to note that in discussing these standards, as applied to "a variety of special purpose structures," the *Binnings* court considers *"the purpose for which the craft was constructed* and the business in which it is engaged," as more conclusive than "the size of the structure, its ability to float, the permanence of its fixation to shore Bottom, and the fact of its movement across navigable waters . . ." *Binnings,* 741 F.2d at 829 (footnotes omitted). As examples of special purpose structures held to be vessels, the *Binnings* court lists a submersible oil storage vessel facility *(Hicks v. Ocean Drilling & Exploration Co.,* 512 F.2d 817 (5th Cir. 1975)), a submersible drilling barge *(Producers Drilling Co. v. Gray,* 361 F.2d 432 (5th Cir. 1966), and a mobile drilling platform with retractable legs (*Offshore Co. v. Robinson,* 266 F.2d 769 (5th Cir 1959)).[11]

The new standard in the majority opinion is stated as follows:

> [I]f a barge or other float's "purpose or primary business is *not* navigation or commerce," then workers assigned thereto for its principal shore enterprise are to be considered seamen only when it is in actual navigation or transit.

See majority opinion, *ante* at 8. Although this rule purports to follow *Binnings,* particularly when read in context with the rest

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11. Although the majority states in its draft that the language in *Offshore* "did not survive [*Binnings*]," and that *Offshore* was "relegated to a footnote [in *Binnings*]," *ante* at 7, I find the "designed to float on water" language in *Offshore* to be very much alive in the second *Binnings* rule quoted above.

of the majority opinion, it is clearly more restrictive than *Binnings*. It downgrades, if not totally eliminates, the "designed purpose of the structure" standard and substitutes actual navigation as the sole requirement. This goes far beyond what the Fifth Circuit, or for that matter any circuit, has decided, and will create a new split rather than mend old ones.

In addition to those already stated, there are, in my view, other important reasons for not adopting this new rule.

Stare decisis. The *Bennett* rule has been in effect since 1975. It is well understood and has been followed without undue difficulty by the bar and district courts. With due respect, I do not believe the new rule is a sufficient enough reason to depart from this established precedent, at the probable cost of creating uncertainty that will lead to an Influx of litigation.

The Bennett rule is a better rule. The Bennett rule more accurately reflects the general maritime law, as is seen from the definition of the term "vessel" in the 27 statutes cited. Applying these definitions to the present situation would promote uniformity in maritime law. In contrast, the new standard will lead to much uncertainty as the same object may be a vessel or non-vessel from moment to moment. The same person, doing the same work, on the same object will receive different legal treatment depending on a totally fortuitous condition. This balkanization of maritime law will be for naught in resolving the owners' insurance problems, as they will still need protection against Jones Act claims for those instances in which the object is legally transformed into a vessel by reason of its movement.

As stated above, the new rule creates unpredictability and haphazardness in its application. For example, does "actual

navigation" mean that once the barge comes to a stop and is anchored or docked, it no longer is a "vessel" even if the condition causing the casualty was created or arose while the now non-vessel was in movement? What about the inverse situation? What principled reason is there for distinguishing between a barge and an ocean liner once *it is* anchored or tied to the dock? Under *Wilander* a dance instructor teaching passengers the "cha-cha-cha" aboard an ocean liner tied to the dock is a "seaman," but under the new rule, appellee, who actually does much more traditional seaman's work, would be denied Jones Act protection because the BETTY F is secured to its spud anchors. What logical reason is there for such a distinction and how would such a rule be framed if it is to make sense? Is the BETTY F "in actual navigation" every night when it is moved away from the bridge or in the mornings when it is moved again alongside? The ambivalence raised by the new rule is endless. Given such uncertainties, is it prudent to change our present rule absent firmer guidance from the Supreme Court?

Finally, given the factual record in this case, I cannot see how even under the new standard, the majority can conclude, as a matter of law, that the BETTY F is not a "vessel." At the very least, the case should be retried on all issues, using the new standard on the Jones Act cause of action as well.

I respectfully dissent.

Appendix G

APPENDIX

a. Rules of Construction Act (1 U.S.C. § 3):

> The word "vessel" includes every description of watercraft or other artificial contrivance used, *or capable of being used,* as a means of transportation on water. (Emphasis supplied.)

b. The Shipping Act (46 U.S.C. § 2101(45)):

> ["V]essel" has the same meaning given that term in Section 3 of Title 1.

c. Merchant Marine Act of 1920 (46 U.S C. § 801):

> [a]ll water craft and other artificial contrivances of whatever description and, at whatever stage of construction, whether on the stocks or launched, *which are used or capable of being or are intended to be used* as a means of transportation on water. (Emphasis supplied.)

d. International Navigational Rules of 1977 (33 U.S.C. § 1601(1)):

> "Vessel" means every description of watercraft, including nondisplacement craft and seaplanes, used *or capable of being used* as a means of transportation on water. (Emphasis supplied.)

e. The Inland Navigation Rules Act of 1980, Rule 3(a) (33 U.S.C. § 2003(a)):

> The word "vessel" includes every description of watercraft,

including nondisplacement craft and seaplanes, used *or capable of being used* as a means of transportation on water. (Emphasis supplied.)

f. Public Health Service Act (42 U.S.C. § 201(i)):

The term "vessel" includes every description of watercraft or other artificial contrivance used, *or capable of being used,* as a means of transportation on water, exclusive of aircraft and amphibious contrivances. (Emphasis supplied.)

g. Excise Taxes Act (26 U.S.C. § 5688(c)):

["V]essel" includes every description of watercraft used, *or capable of being used,* or a means of transportation in water or in water and air; . . . (Emphasis supplied.)

h. Whaling Convention Act (16 U.S.C. § 916(e)):

Vessel: The word "vessel" denotes every kind, type or description of watercraft or contrivance subject to the jurisdiction of the United States used, *or capable of being used,* as a means of transportation. (Emphasis supplied.)

i. Neutrality Act of 1939 (22 U.S.C. § 456(c)):

The term "vessel" means every description of watercraft and aircraft *capable of being used* as a means of transportation on, under, or over water. (Emphasis supplied.)

j. Navigation Act of 1974 (33 U.S.C. § 1502(19)):

["V]essel" means every description of watercraft or other

artificial contrivance used as a means of transportation on or through the water.

k. Deepwater Ports Act (33 U.S.C. § 1502(19)):

["V]essel" means every description of watercraft or other artificial contrivance used as a means of transportation on or through the water.

1. The Oil Pollution Act of 1990 (33 U.S.C. § 701(37)):

["V]essel" means every description of watercraft or other artificial contrivance used, *or capable of being used,* as a transportation on water, other than a public vessel. (Emphasis supplied.)

m. The Sentencing Guidelines Act (18 U.S.C. § 3615):

As used in this section "vessel" includes every description of watercraft used, *or capable of being used* as a means of transportation in water or in water and air. (Emphasis supplied.)

n. 18 U.S.C. § 3667:

As used in this section, "vessel" includes every description of watercraft used, *or capable of being used,* as a means of transportation in water or in water and air. (Emphasis supplied.)

APPENDIX H — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED MARCH 4, 1992 IN *DIGIOVANNI, JR., V. TRAYLOR BROTHERS, INC.*,

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1957

ROCCO P. DIGIOVANNI, JR.,

Appellee,

v.

TRAYLOR BROTHERS, INC.,

Appellant.

JUDGMENT

Entered March 4, 1992

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows; The judgment of the district court is reversed and the cause is remanded for further proceedings consistent with the opinion en banc filed this date.

By the Court:

FRANCIS P. SCIGLIANO, Clerk

APPENDIX I — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED APRIL 17, 1991 IN *DIGIOVANNI, JR. V. TRAYLOR BROTHERS, INC.*

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 90-1957

ROCCO P. DIGIOVANNI, JR.,

Plaintiff, Appellee,

v.

TRAYLOR BROTHERS, INC.,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[Hon. Ernest C. Torres, *U.S. District Judge*]

Before
Torruella, *Circuit Judge*,
Aldrich and Bownes, *Senior Circuit Judges*.

Andrew Rothschild, with whom *John D. Husmann* and *Lewis, Rice & Fingersh*, were on brief for appellant.

David B. Kaplan, with whom *Thomas M. Bond, The Kaplan Group, P.C., Paul V. Gallogly* and *Lovett, Schefrin, Gallogly & Harnett, Ltd.*, were on brief for appellee.

Appendix I

TORRUELLA, *Circuit Judge*. This case arose as a result of personal injuries sustained by Rocco P. DiGiovanni, Jr., while employed by Traylor Brothers ("Traylor Bros.") as a pile driver on the Jamestown, Rhode Island, bridge project. Three counts went to the jury: (1) negligence under the Jones Act, 46 U.S.C. § 688; (2) unseaworthiness under general maritime law; and (3) negligence under 33 U.S.C. § 905(b). The jury found in favor of DiGiovanni on the first two counts, thereby finding it unnecessary to reach the third. After judgment was entered, Traylor Bros. moved for a new trial, or in the alternative, moved to alter or amend the judgment and for judgment notwithstanding the verdict. All motions were denied. Traylor Bros. appealed. On appeal, Traylor Bros. advances two theories why judgment for DiGiovanni was improper. First, Traylor Bros. maintains that the barge to which DiGiovanni was assigned does not qualify as a "vessel" for purposes of the Jones Act or general maritime law. Second, Traylor Bros. contends that DiGiovanni does not fit within the definition of "seaman" under the Jones Act. We disagree.

VESSEL STATUS

"Recovery under the Jones Act or under the general maritime law for unseaworthiness requires affiliation with a " 'vessel'." *Powers v. Bethlehem Steel Corp.*, 477 F.2d 643, 646 (1st Cir.), *cert. denied*, 414 U.S. 856 (1973). We phrase our analysis in terms of the Jones Act; however, a finding of vessel status under the Jones Act applies equally to general maritime law. *Id.* at 646-48. "The existence of a vessel is a 'fundamental prerequisite to Jones Act jurisdiction.' " *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 292 (5th Cir. 1990) (quoting *Daniel v. Ergon, Inc.*, 892 F.2d 403, 407 (5th Cir. 1990) (quoting *Bernard v. Binnings Construction Co.*, 741 F.2d 824, 828 (5th Cir. 1984)).

What constitutes a vessel is ordinarily a jury question. In rare cases, however, when what emerges from the facts and inferences taken in the light most favorable to the plaintiff does not conform with the legal standard of what may properly be classified as a vessel, the district court should not allow the question to go to the jury. *Powers*, 477 F.2d at 646. Traylor Bros. maintains that DiGiovanni's claim should have been treated as one of those rare cases. Because this raises a question of law, we exercise plenary review. *Fashion House, Inc. v. K Mart Corp.*, 892 F.2d 1076, 1083 (1st Cir. 1989).

The First Circuit has not confronted this issue since the early 1970s. *See Bennett v. Perini Corp.*, 510 F.2d 114 (1st Cir. 1975); *Powers*, 477 F.2d 643. At that time, we articulated the following standard: "To be a vessel, the purpose and business must *to some reasonable degree* be the 'transportation of passengers, cargo, or equipment from place to place across navigable waters.' " *Bennett*, 510 F.2d at 116 (quoting *Powers*, 477 F.2d at 647) (emphasis added). Traylor Bros. requests that we modify our standard in accordance with more recent developments in the Fifth Circuit. The Fifth Circuit has adopted a narrower standard which compares a craft's transportation function with its other functions; if its "transportation function remains *subordinate* to its contrasting function[s]," then the craft may not be classified as a vessel. *Gremillion*, 904 F.2d at 294 n.9 (emphasis added). Despite Traylor Bros.' urging, we are constrained by First Circuit precedent. *See Feliciano-Angulo v. Rivera-Cruz*, 858 F.2d 40, 44 n.5 (1st Cir. 1988) (stating that *stare decisis* requires panels in this circuit to follow circuit precedent); *Eubank Heights Apartments, Ltd. v. Lebow*, 669 F.2d 20, 23 n.2 (1st Cir. 1982) (same).

We now apply the legal standard to the facts of this case.

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Because this was the domain of the jury, "we are compelled even in a close case [such as this], 'to uphold the verdict unless the facts and inferences, when viewed in a light most favorable to the [plaintiff], point so strongly and overwhelmingly in favor of the [defendant] that a reasonable jury could not have arrived at this conclusion.' " *Transnat'l Corp. v. Rodio & Ursillo, Ltd.*, 920 F.2d 1066, 1068 (1st Cir. 1990) (quoting *Chedd-Angier Production Co. v. Omni Publications Int'l, Ltd.*, 756 F.2d 930, 934 (1st Cir. 1985)).

The craft involved in this case were a "spud" barge named the "BETTY F" and an adjoining supply barge. Although DiGiovanni mainly worked as a pile driver on board the BETTY F, his injury was sustained while handling tag lines aboard the supply barge. That fact, however, presents no bar tc recovery. *Balfer v. Mayronne Mud & Chemical Co., Inc.*, 762 F.2d 432, 434 (5th Cir. 1985) (a vessel may be "either one particular vessel or an 'identifiable group of vessels' " (quoting *Guidry v. Continental Oil Co.*, 640 F.2d 523, 529 (5th Cir. 1981)).

The BETTY F's main purpose was to serve as a floating platform for a large crawler crane used in pile driving. Located on the BETTY F along with the crane were a tool shed, a trailer box converted into a small cafeteria with a stove, and a refrigerator. The BETTY F also came equipped with navigation lights. The BETTY F could not move great distances on its own, but it could reposition itself around the jobsite by raising and lowering its four spud anchors. Approximately once each month the BETTY F was moved across navigable waters, aided by a tow or push boat, in order to transport the crane to a new jobsite.

The supply barge upon which DiGiovanni was injured housed supplies and equipment including steel piling beams, a pile driver hammer, and a power pack. The barge was used to

transport these supplies from shore to the jobsite, although not under its own motive power. Neither the supply barge nor the BETTY F provided housing for crew members. The daily work crew had to be transported to and from the jobsite on a crew boat.

The BETTY F and its supply barge strongly resemble the craft under question in *Bennett. Bennett* involved a steel-hulled barge named the "SCOW 101" which was also without motive power of its own. Like the BETTY F, the SCOW 101 had to be towed from jobsite to jobsite. The SCOW 101 was used to carry structural materials, tools, and a crane. At the time of plaintiff's injury, the SCOW 101 was tied alongside a pier of the Newport-Jamestown Bridge in Narragansett Bay. *Bennett,* 510 F.2d at 115-16. On appeal, this court determined that the SCOW 101 was more than a "floating dock[ ] or dry-dock[ ], traditionally regarded as [an] extension[ ] of land." *Id.* at 116. We conferred upon the SCOW 101 the status of vessel.

While we recognize that the transportation function of the BETTY F and its supply barge, like the SCOW 101 in *Bennett,* was not overwhelming, both barges nevertheless transported equipment across navigable waters sufficiently often for that function to have been considered by a jury as being "to some reasonable degree" the function of the craft. We will not, therefore, overturn the determination below.

SEAMAN STATUS

Having determined that a vessel was involved, we now consider whether DiGiovanni was properly labelled a "seaman" for purposes of the Jones Act.[1] *See Gremillion,* 904 F.2d at 292

1. The Jones Act provides: "Any seaman who shall suffer personal (Cont'd)

(holding that the existence of a vessel is a prerequisite to seaman status). We again find ourselves faced with a legal challenge. Traylor Bros. questions the appropriateness of the legal standard relied upon by the district court in attributing seaman status to DiGiovanni. We therefore begin our analysis under plenary review. *Fashion House,* 892 F.2d at 1083.

At the time Traylor Bros. filed this appeal, circuits were split as to the proper standard for determining seaman status. The leading circuits reflecting that split were the Fifth, *Offshore Co. v. Robison,* 266 F.2d 769 (5th Cir. 1959), and the Seventh, *Johnson v. John F. Beasley Construction Co.,* 742 F.2d 1054 (7th Cir. 1984), *cert. denied,* 469 U.S. 1211 (1985). The Fifth Circuit adopted the following two-part test: If an employee (1) was assigned permanently to a vessel or performed a substantial amount of work on a vessel and (2) worked in a capacity or manner which "contributed to the function of the vessel or to the accomplishment of its mission, or the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips," then the employee qualified for seaman status. *Robison,* 266 F.2d at 779; *see also Barrett v. Chevron, U.S.A. Inc., E.E.B. Co.,* 781 F.2d 1067, 1072 (5th Cir. 1986). The Seventh Circuit favored a more stringent standard which required the employee's duties to be related to the transportation function of the vessel. *Johnson,* 742 F.2d at 1061. This circuit followed *Robison. Bennett,* 510 F.2d at 116-17.

Since Traylor Bros.' appeal, the Supreme Court has settled this dispute. *See McDermott Int 'l, Inc. v. Wilander,* 1991 WL 177734 (U.S.). The Seventh Circuit standard was clearly rejected. *Id.* at 10 ("We think the time has come to jettison the

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(Cont'd)
injury in the course of his employment man . . . maintain an action for damages at law." 46 U.S.C. § 688 (1920).

aid in navigation language"). The proper inquiry, as articulated by the Court, is whether the employee is connected with a vessel and is performing the work of the vessel. *Id. at* 10-11. "It is not necessary that [the] seaman aid in navigation or contribute to the transportation of the vessel;" the employee simply must be "doing the ship's work." *Id.* at 11.

The issue now becomes "whether the facts meet the statutory standard." *Id.* It is the province of the jury to find the facts and apply the legal standard. *Id.* at 12. The jury determination will be upheld if, based on the facts taken in the light most hospitable to the party for whom the jury held, together with all reasonable inferences therefrom, a rational jury could have reached that conclusion. *Rodio & Ursillo,* 920 F.2d at 1068.

Applying a standard substantially similar to the one adopted in *Wilander,*[2] the jury in this case determined that DiGiovanni qualified for seaman status. We see no reason to overturn that finding on appeal. The main function of the BETTY F was to act- as a platform for a crawler crane used in pile driving. DiGiovanni was assigned to the BETTY F as a pile driver and was injured while steadying tag lines connected to the pile driver hammer. Clearly DiGiovanni was doing the work of the vessel.

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2. The district judge instructed the jury that DiGiovanni qualified for seaman status if he met the following two requirements: (1) "he [was] assigned permanently to a vessel or he performed a substantial part of his work on a vessel," and (2) "the capacity in which he was employed or the duties which he performed [ ] contributed to the functions of the vessel or the accomplishment of its mission or its operation or welfare during its movement or during anchorage."

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CONCLUSION

We uphold the district court's determination regarding both vessel status and seaman status. The jury's finding of negligence under the Jones Act and unseaworthiness under general maritime law is therefore *affirmed.*

APPENDIX J — RELEVANT STATUTES

The Communications Act of 1934 (47 U.S.C. § 153(w)(1)):

> ["V]essel" includes every description of watercraft or other artificial contrivance, except aircraft, used or *capable of being used,* as a means of transportation on water, whether or not it is actually afloat. (Emphasis supplied.)

The Tariff Act of 1930 (19 U.S.C. § 1401(a)):

> The word "vessel" includes every description of watercraft or other contrivance used, *or capable of being used,* as a means of transportation in water, but does not include aircraft. (Emphasis supplied.)

The Interstate Act Against Importation and Exportation of Motor Vehicles, Vessels and Aircraft Act. (18 U.S.C. § 553(c)(3)):

> ["V]essel" has the meaning given that term in Section 401 of the Tariff Act of 1930 (19 U.S.C. 1401, *ante).*

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CFRCLA) (42 U.S.C § 9601(28)).

> The term "vessel" means every description of watercraft or other artificial contrivance used, *or capable of being used,* as a means of transportation on water.) (Emphasis supplied.)

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The Anti-Gambling Act (18 U.S.C. § 1081):

> The term "vessel" includes every kind of water and aircraft or other contrivance used *or capable of being used* as a means of transportation on water, or on water and in the air, as well as any ship, boat, *barge,* or other watercraft or any structure capable of floating on the water. (Emphasis supplied.)

The Federal Ship Mortgage Insurance Act (46 U.S.C. § 1271(b)):

> The term "vessel" includes all types, whether in existence or under construction, of passenger cargo and combination passenger cargo carrying vessels, tankers, tugs, towboats, *barges,* dredges and ocean thermal energy conversion facilities or plant ships which are or will be documented under the laws of the United States, . . . (Emphasis supplied.)

The Contraband Seizure Act (49 U.S.C. § 787(a)):

> The term "vessel" includes every description of watercraft or other contrivance used, or *capable of being used,* as a means of transportation in water, but does not include aircraft. (Emphasis supplied.)

The Antifouling Paint Control Act of 1988 (33 U.S.C. § 2401(11)):

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> The term "vessel" includes every description of watercraft or other artificial contrivance used, *or capable of being used,* as a means of transportation on water. (Emphasis supplied.)

The Interstate Commerce Act (49 U.S.C. § 10102(28)):

> The term vessel means a watercraft or other artificial contrivance that is used, is *capable of being used, or is intended to be used,* as a means of transportation by water. (Emphasis supplied.)

The Submarine Cable Act (47 U.S.C. § 30):

> [T]he term vessel shall be taken to mean every description of vessel used in navigation, in whatever way it is propelled . . .